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No._____

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IN THE

Supreme Court of the United States

October Term, 1982

HAYFIELD NORTHERN RAILROAD COMPANY, INC.,
Appellant,

and

STATE OF MINNESOTA,
Appellant/Intervenor,

v.

CHICAGO, NORTH WESTERN TRANSPORTATION COMPANY,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

The question presented is whether 49 U.S.C. §10905 preempts the exercise of sovereign power of eminent domain over an abandoned railroad line where a railroad has abandoned a rail line in Minnesota under the following conditions:

(1) the Interstate Commerce Commission has given its approval,

(2) the ICC has relinquished all jurisdiction and interest in the rail line, and

(3) a statutorily authorized rail company has properly invoked Minnesota condemnation law in order to recommence rail service to citizens in Minnesota.

LIST OF PARTIES

In addition to the captioned parties, the States of Iowa and Wisconsin filed pleadings amicus in support of the joint petition of the Hayfield Northern and the State of Minnesota for rehearing and rehearing en banc.

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CHICAGO, NORTH WESTERN TRANSPORTATION COMPANY,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

Appellant Hayfield Northern Railroad, Inc., and appellant/intervenor State of Minnesota jointly appeal from the judgment and opinion of the United States Court of Appeals for the Eighth Circuit of December 3, 1982, declaring that the Minnesota law providing for the taking of abandoned railroad property by eminent domain is preempted by 49 U.S.C. §10905.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) affirming the order of the district court is reported at 693 F.2d 819. The order of the district court granting summary judgment to Chicago and North Western (Appendix C) is not reported.

JURISDICTION

The judgment (Appendix B) and opinion of the Court of Appeals were entered on December 3, 1982. The motion for rehearing and rehearing *en banc*, timely filed, was denied on January 18, 1983 (Appendix D). A notice of appeal to this Court was filed on February 24, 1983 (Appendix E). Jurisdiction is conferred on this Court by 28 U.S.C. 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Minn. Stat. § 222.27 (1982) provides as follows:

> *Power to acquire property*—Every foreign and domestic railroad corporation shall have the power to acquire, by purchase or condemnation, all necessary roadways, spur and side tracks, rights of ways, depot grounds, yards, grounds for gravel pits, machine shops, warehouses, elevators, depots, station houses, and all other structures necessary or convenient for the use, operation, or enjoyment of the road, and may make with any other railroad company, such arrangements for the use of any portion of its tracks and roadbeds as it may deem necessary.

Minn. Stat. § 300.04 (1982) provides as follows:

> *State and local control; eminent domain*—The state shall at all times have the right to supervise and regulate the business methods and management of any such corporation and from time to time to fix the compensation which it may charge or receive for its services. Every such corporation obtaining a franchise from a city shall be subject to such conditions and restrictions as from time to time may be imposed upon it by such municipality. Every such corporation may acquire by right of eminent domain such private property as may be necessary or convenient for the transaction of the public business for which it was formed. No street railway company shall have or exercise such right within the limits of any city.

49 U.S.C. §10905 (*Offers of Financial Assistance to Avoid Abandonment and Discontinuance*) is set forth in Appendix F.

49 U.S.C. §10903 (*Authorizing Abandonment and Discontinuance of Railroad Lines and Rail Transportation*) is set forth in Appendix G.

Article 6, Section 2 of the United States Constitution provides as follows:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article I, Section 8 of the United States Constitution provides as follows:

> "Congress shall have power . . . [To] regulate Commerce . . . among the several states . . ."

STATEMENT OF THE CASE

Raising the Question

Hayfield Northern Railroad Corporation (Hayfield Northern) and the State of Minnesota ("State") have contended at all stages of the proceedings in briefs and in argument that Minnesota may exercise the power of eminent domain on an abandoned rail line. Under Minnesota law this power has been properly delegated by statute to the Hayfield Northern Railroad. Hayfield Northern and the State have also contended at all stages that after an Interstate Commerce Commission (ICC) certificate of abandonment has been issued, the rail line in question is not in commerce and the federal interest in that line is at an end. Therefore, the disposition of abandoned rail property is a matter beyond federal jurisdiction and within a State's reserved jurisdiction. The lower courts found that 49 U.S.C. § 10905 preempts condemnation of abandoned rail lines.

Statement of Facts

Appellant Hayfield Northern Railroad Company, Inc., is a Minnesota public service corporation. It was formed in the Spring of 1982 to restore rail service to rural Dodge County, Minnesota. Minnesota law delegates to Hayfield Northern the power to condemn abandoned rail lines. Minn. Stat. § 222.27 (1982); Minn. Stat. § 300.04 (1982).

Appellee Chicago and North Western Transportation Company (CNW) has abandoned 19.2 miles of track in Dodge and Mower Counties, Minnesota. This abandonment was consistent with all federal abandonment requirements including the compulsory forced sales provision of the Staggers Rail Act, 49 U.S.C. 10905 (Supp. IV 1980).

In early April 1982, the CNW began to dismantle the Hayfield line. Hayfield Northern immediately sought injunctive relief in state court to preserve the line intact in order to begin condemnation proceedings.

On April 2, 1982, the Minnesota State District Court granted injunctive relief to the Hayfield Northern.

The CNW immediately removed this case to Federal Court. The State of Minnesota intervened in support of the Hayfield Northern to protect the constitutionality of the state statutes. On July 22, 1982, the District Court dissolved the injunction and dismissed the case, holding that 49 U.S.C. § 10905 preempts state condemnation procedures.

On July 23, 1982, Hayfield Northern and the State filed their notice of appeal. On July 24, 1982, Hayfield Northern sought extraordinary relief, in the form of a stay pending appeal. On July 26, 1982, the Eighth Circuit granted an interim stay pending appeal and scheduled argument for July 28, 1982, on the propriety of the stay. After argument, the Eighth Circuit Court granted the motion for stay pending appeal and Hayfield Northern's oral motion for an expedited appeal upon the posting of $100,000.00 bond on or before August 2, 1982. The bond was posted timely.

On December 3, 1982, the Eighth Circuit Court of Appeals affirmed the judgment of the District Court. The Circuit Court held that the Staggers Rail Act of 1980, 49 U.S.C. 10905 (Supp. IV 1980), preempts Minnesota condemnation law when a Minnesota railroad company attempts to condemn the track and right of way of a properly abandoned rail line in order to continue rail service on that line." 693 F.2d at 820.

The joint petition for rehearing filed by the Hayfield Northern and the State was denied on January 18, 1983. The

States of Wisconsin and Iowa supported the petition for rehearing. On January 22, 1983, petitioners filed a joint petition to stay the issuance of the Eighth Circuit's mandate. This petition was denied on February 9, 1983 (Appendix H). On February 10, 1983, the joint petition filed by the State and Hayfield Northern was denied by Circuit Justice Blackmun. (Appendix I) On February 22, 1983, Justice Rehnquist denied the request for a stay (Appendix J), after referring the matter to the Solicitor General for the view of the United States. (Amicus Memorandum of the United States is set forth in full in Appendix L). On March 7, 1983, the full Court denied the joint application to stay the mandate (Appendix K).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL[1]

Whether State Power of Eminent Domain May Be Exercised on Abandoned Property That Once Was a Rail Line Regulated by the Federal Government.

The question whether a state or an entity with the delegated power of eminent domain may take an abandoned rail line by eminent domain after the passage of the Staggers Act has

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[1] For reasons set forth in this section, the federal questions presented are substantial. Accordingly, there is no need for the Court to reach the issue whether 28 U.S.C. 1254(2) requires review regardless of "substantiality". As observed by Professors, Wright, Miller, and Cooper:

> The historic analogy to appeals from state courts that gave birth to §1254(2) extends beyond the finality issue to suggest that appeal jurisdiction might be defeated by lack of a substantial question. This possible limitation should be rejected. . . . State court appeals are most likely to be dismissed because a state court has rejected a frivolous attack on a state statute. Appeal lies from a Court of Appeals, on the other hand, only if it has held a state statute invalid. There may be some state statutes that are so transparently invalid that the Supreme Court need not bother with full presentation of arguments. Such cases are apt to be rare. The court can protect itself against them, if they should arise, by summary affirmance rather than by dismissal. Wright, Miller and Cooper, Federal Practice and Procedure §4037, p. 39 (1978).

The authors further suggest at footnote 19 that Rule 16's differentiated treatment of motions to dismiss, depending on whether the appeal comes from a state or a federal court further supports their position. Under Rule 16.1(b), the motion to dismiss an appeal from a state court may be based on failure to present a substantial federal question. Whether a motion to dismiss an appeal from a federal court of appeals under Rule 16.1(c) can be sustained on the ground that there is no substantial federal question is not clear.

broad implications for constitutional ordering of federal and state relationships. The Solicitor General in his amicus memorandum to this Court (Appendix L) stated, "The Court of Appeals decided an important issue of federal law that implicates the interest of several federal agencies and involves delicate questions of federalism . . . [this case involves complex and important] . . . substantive issues . . .". The public interest in this case of first impression is demonstrated by the intervention of the States of Minnesota, Wisconsin and Iowa in support of the position of Hayfield Northern. On information, other states will apply to file briefs amicus.

A certificate of abandonment issued by the Interstate Commerce Commission evidences that the rail line in question is not in interstate commerce but mere property subject to the legitimate processes of state law, including seizure by eminent domain. Abandonment is legally defined as a "permanent or indefinite cessation of rail service" that terminates a railroad's public service obligation. *Gibbons v. United States*, 660 F.2d 1227, 1234 (7th Cir. 1981); 49 U.S.C. § 10903.

A certificate of abandonment relieves the railroad of its common carrier obligations and the costs of providing service. In addition, an abandonment has the effect of removing the line from interstate commerce. Accordingly, the Commerce Clause cannot be used to shield an abandoned rail line from the processes of state law, as opposed to a line in the process

of being abandoned. *See Modern Handcraft, Inc.-Abandonment In Jackson County, Missouri*, 363 I.C.C. 969 (1981). The act of abandonment is proof that a rail line has been removed from interstate commerce and relegated to local interest. The taking of this line by the power of eminent domain does not contravene the Commerce Clause, since this rail line within Minnesota is not in interstate commerce nor does the line have any substantial effect on interstate commerce.

The Staggers Rail Act of 1980 (Staggers Act) amended the Interstate Commerce Act, 49 U.S.C. § 10903-§10905, governing railroad abandonments and discontinuances of services. These sections of the Act reflect congressional concern for the economic condition of the nation's railroads. This condition was made worse by the burden of the body of interstate commerce law and regulations that forced a railroad to continue to operate unprofitable lines while seeking a certificate of abandonment from the I.C.C. Such a certificate often was issued only after protracted administrative and legal proceedings. *See Chicago and North Western Transportation Company v. United States*, 678 F.2d 665 (7th Cir. 1982).

The Eighth Circuit correctly emphasized that the Staggers Act was the congressional response to the protracted administrative and legal proceedings that attended abandonments. *Hayfield Northern Railroad* at 693 F.2d 822. Congress provided a mechanism for quick and easy exist from an unprofitable line. 49 U.S.C. § 10903. Congress also provided a method for purchasing a rail line by an interested party. 49 U.S.C. 10905. In short, the ICC, upon request by a financially responsible party, will set a value on the line within 60 days of

the request for valuation. This value is binding on the railroad but a potential offeror may walk away. *Id.* The congressional history of the act shows that Congress did not deem this to be the sole or exclusive method to be used in purchasing a rail line sought to be abandoned. Congress deemed §10905 to provide a method to purchase the rail line before abandonment. "This program has the advantage of avoiding expensive protracted litigation. It provides the carrier desiring to abandon the line a vehicle for prompt abandonment. It creates a method for transferring the rail properties prior to their downgrading [to wit: before the line is abandoned]." H. Rep. No. 96-1035, 96th Congress 2nd Sess. (1980), reprinted in 1980 U.S. Code Cong. Ad. News 3988. A rail line so purchased has avoided abandonment and continues as a rail line charged with the same regulatory burdens as before the purchase. The purchaser under this procedure has the same interest in title as the abandoning (selling) railroad, i.e. where the selling railroad owns an easement, the new purchaser buys that easement.

The property interest in a rail line taken through condemnation is different. After a seizure by power of eminent domain, the condemnor becomes owner in fee of the property and obtains a new certificate of convenience and necessity from the Interstate Commerce Commission to run the line. This line would not be subject to the same regulatory burdens as existed before abandonment. *See generally Simmons v. Interstate Commerce Commission*, 697 F.2d 326 (D.C. Cir. 1982).

Nowhere in the legislative history of the Act or in the language of the statute does Congress state that the Interstate Commerce Commission was granted exclusive and plenary authority to provide for continuation of rail service in connection with abandonments. *Cf. Equal Employment Opportunity Commission v. Wyoming*, 51 U.S.L.W. 4219 (March 2, 1983)

(where the extension of the Age Discrimination in Employment Act to cover state and local governments was found valid after specific legislative history and congressional findings bolstered preemption.) The Eighth Circuit holding is further undermined by the ICC's response to the Association of American Railroads' (AAR) pleadings (Appendix M) in rule making procedures concerning § 10905. *Ex Parte No. 274 (Subd-No. 6), Abandonment of Railroad Lines and Discontinuance of Service,* (49 C.F.R. Part 1121), 365 I.C.C. 249 (1981). The AAR stated that "[n]othing prevents a state from exercising its rights under the Staggers Act then walking away from the proceeding or decision of the Commission regarding the valuation or purchase price, and beginning a condemnation proceeding seeking . . . favorable treatment by [a state] . . . court." (Appendix M, at A-38). The AAR suggested that prospective State purchasers who make an offer for a line of rail under § 10905 be required to make a 25% non-refundable deposit to the carrier to discourage them from obtaining an ICC valuation, and thereafter "walking away" under 49 U.S.C. 10905(f) (2) to commence state condemnation proceedings. The ICC rebuffed this suggestion as discriminatory against states and effectively eliminating their right to "walk away". Most significant, however, was the fact that the exact issue raised here was raised and the ICC made no indication that the condemnation action the AAR wanted to forestall was not perfectly permissible. The Eighth Circuit inferred that Congress intended to preempt, however.

The practice of inferring legislative intent from legislative silence leads to much guess work and resultant error. Before passage of the Staggers Act Amendments, a state could exercise state process over a rail line once a certificate of abandonment had been issued. *See e.g., New Orleans Terminal Company v. Spencer,* 366 F.2d 160, 164, 166 (5th Cir. 1966); *Com-*

monwealth v. Bartlett, 266 F.Supp. 390, 393 (D.Mass. 1967) *aff'd* 384 F.2d 819 (1st Cir. 1967) *cert. denied* 390 U.S. 1003; *Kansas City Area Transportation v. Ashley*, 555 S.W.2d 9 (Missouri 1977). These decisions acknowledge *sub silentio* that before and during abandonment state interests are subordinated to the I.C.C. *See Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). The Eighth Circuit accordingly found that Congress by implication repealed existing law concerning the exercise of state sovereignty over abandoned rail lines. Repeals by implication are disfavored. *See e.g., United States v. Borden Company*, 308 U.S. 188, 198-199 (1939). This follows because Congress enacts legislation aware of the common law; without express intention to change common law, the presumption is against change. Where, as here, there are two statutory schemes that are capable of co-existing, (one providing pre-abandonment transfer and the other post-abandonment transfer), courts in the absence of a "clearly expressed congressional intention to the contrary" reconcile the schemes to give effect to both. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). This is the case whether the analytical underpinning is statutory construction, *Morton*, or the preemption doctrine. *Huron Portland Cement Company v. City of Detroit*, 362 U.S. 440 (1960).

Accordingly, this Court has refused to find conflict between federal and state regulation "unless there is a clear collision with a national law which has the right of way." *Kessler v. Department of Public Safety*, 369 U.S. 153, 172 (1962). The Minnesota scheme and the federal scheme are complementary. Section 10905 provides a method for uninterrupted rail service by a replacement carrier on lines that had been unprofitable for their former owners, while eminent domain provides the states a method to recommence rail service on a line that has been abandoned. Both schemes are in harmony with the dual

congressional objective of (1) permitting railroads swiftly to abandon unprofitable lines and thereby to escape operating costs and (2) placing "the states at the forefront of the federal effort to preserve local rail service". *Simmons v. Interstate Commerce Commission*, 697 F.2d 326, 329 (D.C.Cir. 1982).

In addition, the Interstate Commerce Commission has stated that after a certificate of abandonment has been issued questions of title to, and disposition of property are matters subject to State law. *Ex Parte No. 274 (Sub.-No. 6) Abandonment of Railroad Lines and Discontinuance of Service* (49 C.F.R. Part 1121, 365 I.C.C. 249, 260 (1981)); *accord, Modern Handcraft, Inc.-Abandonment in Jackson County, Missouri*, 363 I.C.C 969 (1981). In *Finance Docket No. 28990F, Common Carrier Status of States, State Agencies and Instrumentalities, and Political Subdivisions*, 363 I.C.C. 132, 135 (1980), the Commission said, "When a rail line has been fully abandoned, it is no longer rail line and the transfer of the line is not subject to our jurisdiction. However when a line has not been fully abandoned the transfer of line is subject to our jurisdiction." The Eighth Circuit chose to distinguish these rulings in its decision. 693 F.2d at 823, 824. In doing so, it interpreted §10905 contrary to the expressed view of even the railroad industry lobby, Association of American Railroads (Appendix M, at A-39).

The Eighth Circuit did not have the benefit of the Commission's presence in the proceedings below.[2] The Commission chose not to participate when asked to do so by the CNW at the District Court level and again chose not to participate when asked by the State of Minnesota and the Hayfield Northern at the time of the petition for rehearing (Appendices

[2] Hayfield Northern invited the District Court to refer this case to the ICC for determination. 28 U.S.C. 1336(b). The Eighth Circuit on petition for rehearing and rehearing *en banc* was invited to refer this case to the ICC.

N, O, P). The Commission, however, made available to Congress its view on whether a state or an entity with the delegated power of eminent domain could exercise this power after passage of the Staggers Act. *Id.* These documents all declare that §10905 does not preempt a subsequent condemnation proceeding under state law. These documents were made available to the State of Minnesota after the motions for rehearing were denied by the Eighth Circuit.

It is regrettable that the Commission chose not to come forward in an area of its expertise which involves "delicate questions of federalism." If the Eighth Circuit had had the benefit of Commission wisdom, the Circuit might not have explained away as dictum the language in a recent Seventh Circuit case that assumed that a state has the power to condemn an abandoned rail line. *Chicago and North Western Transportation Company v. United States*, 678 F.2d 665 (7th Cir. 1982). This assumption was essential to the rationale of the Seventh Circuit holding even though this decision involved another issue under the Staggers Act, i.e. the meaning of just compensation under 49 U.S.C. §10905. This conflict in principle among the circuits might have been obviated if the Commission had participated.

The Solicitor General in preparing his amicus pleading to the Court invited the Interstate Commerce Commission to comment. (Appendix Q). These comments, prepared by General Counsel of the ICC, have been approved by the Commission. (Appendix R). General Counsel in these comments disagreed with the holding of the Eighth Circuit Court of Appeals and the Eighth Circuit's interpretation of the congressional history of the Staggers Act. General Counsel commented, in part, as follows:

When Congress amended Section 10905 in the Staggers Rail Act of 1980, it shortened from six months to 110 days the period during which a potential purchaser or subsidizer negotiates with the railroad that is abandoning the line. Compare 49 U.S.C. (Supp. II) 10905(b) with 49 U.S.C. (Supp. IV) 10905(c)-(f). Congress indicated that the amendment "protect[ed] carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process." H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 125 (1980).

The court of appeals interpreted the remarks of the Committee on Conference on the Staggers Act to means [sic] that carriers should be protected from condemnation actions after abandonment has occurred. I believe, however, that Congress referred to the six month proceedings under former Section 10905, during which the abandonment of rail line was held in abeyance while an offeror and the railroad negotiated a subsidy or purchase price. Those proceedings delayed the abandonment. By contrast, the state law condemnation action at issue did not extend abandonment, which already had occurred when Hayfield filed the action.

. . .

I also find a conflict between the court of appeals decision and the interest of the federal government (largely that of DOT) in encouraging states and their subdivisions to continue rail service that is not required in Interstate Commerce. In 1973, Congress enacted a federal entitlement program that allowed states and their subdivisions to continue rail service and provide loans for state acquisition and modernization of rail properties. Sections 401-403, Regional Railroad Reorganization Act of 1973, Pub. L. 93-236, 87 Stat. 985, 1010-1012. In 1976, Congress repealed those provisions and replaced them with a comprehensive local rail service assistance program including both entitlement funds and financial assistance. Sections 803, 805, 806, Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31, 130-133, 139-143. See also Chicago & North Western, supra, 678 F.2d 665. As the funds for such en-

titlement programs diminish in an era of fiscal restraint, the states will depend more on condemnation as a means to continue rail service.

Since the Eighth Circuit ruled, the District of Columbia Circuit in *Simmons v. Interstate Commerce Commission*, 697 F.2d 326 (D.C. Cir. 1982), has cited approvingly Commission rules that instruct the Commission lacks "jurisdiction to regulate state acquisition of abandoned rail line, since by the process of abandonment the line lost its status as rail property." *Id.* at 331. *Simmons* involved the limited exemption from common carrier status under the Interstate Commerce Act to states that merely own rail lines and provide financial assistance to service providers. *Simmons* found that the Staggers Act Amendments to the Interstate Commerce Act were in furtherance of the congressional policy of placing the states at the forefront of retaining local rail service. *Id.* at 329. Under this view every effort of a state to preserve rail service is encouraged.

The Eighth Circuit decision is an unwarranted assault on state sovereignty. The Circuit suggests that after an abandonment a State is forever prevented from condemning pursuant to state law. This startling suggestion reduces the state prerogative of eminent domain to insignificance: it prevents condemnation of abandoned rail properties, even when such properties lie solely within one state and are beyond ICC jurisdiction. The power of eminent domain is an essential attribute of sovereignty without which a state cannot be a state. NICHOLS, THE LAW OF EMINENT DOMAIN (3d. Ed. 1981), §1.141 [2]. "The power is as enduring and indestructible as the state itself." *Id.* The power of eminent domain has been distinguished from the police power in that "the former involves the taking of property because of its

need for the public use while the latter involves the regulation of such property to prevent the use thereof in a manner that is detrimental to the public interest." *Id.* at 1.42. The power of eminent domain is "essential to the separate and independent existence" of a state and beyond the reach of the Commerce Clause when the subject is abandoned rail property. *See National League of Cities*, 426 U.S. 833, 845 (1976) (*quoting Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869)); *see also, Texas v. White*, 74 U. S. (7 Wall.) 700, 725 (1869) ("The constitution in all its provisions, looks to an indestructible Union, composed of indestructible states.")

The Eighth Circuit decision has the effect of undermining one of the essential powers of sovereign states. Eminent domain has been traditionally and indisputably an attribute of state sovereignty. Since the steam age, the states have exercised the power of eminent domain on abandoned raillines. To remove this power will impair a state's ability "to structure integral operations in areas of traditional governmental functions." *See id.* at 852; *see also, New Orleans Terminal Company v. Spencer*, 366 F.2d 160, 164, 166; *Commonwealth v. Bartlett*, 266 F.Supp. 390, 393 (D.Mass. 1967), *aff'd*, 384 F.2d 819 (1st Cir. 1967), *cert. denied*, 390 U.S. 1003; *Kansas City Area Transportation v. Ashley*, 555 S.W.2d 9 (Missouri 1977) *and cf. United Transportation Union v. Long Island Railroad Company*, 458 U.S. 678 (1982) (running a railroad not a traditional state function). This decision does not merely remove a "police power," since eminent domain is not a "police power," but it repeals a traditional and inseparable attribute of sovereignty. It in effect confers owners of private property with one attribute of sovereignty, since the rail property will not be subject either to federal regula-

tion or to State power. The CNW may sell (at any price) or hold; however, Minnesota may not condemn. (This result is particularly harsh on states such as Wisconsin which may not purchase through §10905 because of constitutional and statutory prohibitions against works of internal improvement. Wis. Const. Art. VIII, §10; Wis. Stat. §85.09. (Appendices S and T). Only abandoned rail property may be purchased, i.e. rail property that has been certified abandoned by the ICC. Section 10905 reaches property that has avoided abandonment.)

CONCLUSION

The appellants submit that they are entitled, as a matter of right, to review by the Court. The standard of review under §1254(2) need not be reached in this case, (*see* footnote 1), since the lower courts' assault on state sovereignty presents a substantial federal question. Therefore, this case is of great public interest and requires plenary consideration by the Court.

Respectfully submitted,

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March 23, 1983

82-1579

Office-Supreme Court, U.S.
FILED
MAR 25 1983
ALEXANDER L. STEVAS,
CLERK

No._____

IN THE

Supreme Court of the United States

October Term, 1982

HAYFIELD NORTHERN RAILROAD COMPANY, INC.,
Appellant,

and

STATE OF MINNESOTA,
Appellant/Intervenor,

v.

CHICAGO, NORTH WESTERN TRANSPORTATION COMPANY,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1880

HAYFIELD NORTHERN RAILROAD
COMPANY, INC.,
Plaintiff/Appellant,

vs.

CHICAGO and NORTH WESTERN
TRANSPORTATION COMPANY,
Defendant/Appellee,

STATE OF MINNESOTA,
Intervenor/Appellant.

Appeal from the United States District Court for the District of Minnesota.

Submitted: September 16, 1982
Filed: December 3, 1982

Before HEANEY, BRIGHT, and ARNOLD, Circuit Judges.

ARNOLD, Circuit Judge.

In this case we must decide whether 49 U.S.C. §10905 (Supp. IV 1980) preempts Minnesota condemnation law when

a Minnesota railroad company attempts to condemn the track and right of way of a properly abandoned rail line in order to continue rail service on that line. We conclude that it does.

I

On January 30, 1981, Chicago and North Western Transportation Company (CNW) filed an application for a certificate of abandonment for its railroad line between Oelwein, Iowa, and Randolph, Minnesota. Several shippers from southern Minnesota (Shippers Group) opposed the abandonment of a 19.2-mile segment of the line between Dodge Center and Sargeant, Minnesota, and between Hayfield and Waltham, Minnesota. After an Administrative Law Judge (ALJ) found that the public convenience and necessity permitted abandonment of the entire line, the Shippers Group, pursuant to 49 U.S.C. §10905, made an offer to subsidize operation of the 19.2-mile segment. When the parties could not agree on terms, the Interstate Commerce Commission found that the net liquidation value of the segment was $1,791,354.[1] Shortly thereafter, the Shippers Group withdrew their offer, and, on November 17, 1981, the certificate of abandonment issued.

Soon after making the subsidy offer, the Shippers Group filed an administrative appeal of the ALJ's decision authorizing abandonment. The Commission denied the appeal, and the Shippers Group filed a petition for review in this Court. In early January 1982, after unsuccessfully seeking a stay of the

[1] It was necessary to determine net liquidation value before the amount of the subsidy could be calculated. The subsidy should equal "the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line . . ." 49 U.S.C. §10905(d)(2)(A). One element of the "value of the line" is the net liquidation value of the rail properties on the line. 49 C.F.R. §1121.44(c) (1981).

order permitting abandonment, the Shippers Group withdrew their appeal of the substantive decision.

Meanwhile, CNW made contracts with the State of Iowa and some Iowa shippers which involved improving certain trackage in Iowa. CNW planned to salvage and use the rail from the 19.2-mile segment for this purpose.

On March 31, 1982, members of the Shippers Group formed the Hayfield Northern Railroad Company, Incorporated, which, under Minnesota law,[2] had the power to condemn abandoned rail lines. On the same day, Hayfield Northern filed suit in the Dodge County, Minnesota, District Court, alleging that it wanted to condemn the track, appurtenances, and right of way on the 19.2-mile segment and requesting a temporary restraining order to prevent CNW from removing the property. The state court granted the restraining order.

CNW then removed the suit to the United States District Court for the District of Minnesota,[3] and the State of Minnesota intervened to defend the constitutionality of its condemnation law as applied. The District Court[4] entered summary judgment in favor of CNW, dissolved the restraining order, and dismissed Hayfield Northern's complaint with prejudice, holding that, on the facts presented, 49 U.S.C. §10905 preempts state condemnation procedures.

Hayfield Northern appealed and moved for a stay pending appeal and for an expedited appeal. After argument, this Court granted the motions upon the posting of a $100,000 bond. We now affirm.

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[2] Minn. Stat. Ann. §222.27 (West 1972); Minn. Stat. Ann. §300.04 (West Supp. 1982).

[3] Jurisdiction was based on diversity of citizenship.

[4] The Hon. Paul A. Magnuson, United States District Judge for the District of Minnesota.

II

Two recent Supreme Court cases, *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 102 S. Ct. 3014 (1982), and *Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982), guide our inquiry into whether Minnesota condemnation law is superseded by §10905. The preemption doctrine is derived from the Supremacy Clause, U.S. Const. art. VI, cl. 2, which reads:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

As we observed in *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1128 (8th Cir. 1982), the determination whether a state law is "contrary" to a federal statute, and thus preempted, is an inexact task; the answer depends on Congress's intent. Congress may have intended that its enactment foreclose all state legislation on the same subject, or it may have intended to leave the states free to enforce nonconflicting laws and regulations.

Congress's intent to foreclose all state law on the same subject, to "occupy the field," may be express, explicitly stated in the statute, or implied, implicitly contained in the statute's structure and purpose. *Fidelity Federal Savings & Loan Association, supra*, 102 S. Ct. at 3022.

> Absent explicity pre-emptive language, Congress' intent to supersede state law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "The Act of Congress may touch a field in which the federal interest is so dominant that the federal system

> will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose."

Ibid. (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Without regard to whether Congress intended to foreclose all state legislation on the same subject, "a state statute is void to the extent that it actually conflicts with a valid federal statute . . . ." *MITE Corp., supra*, 102 S. Ct. at 2635. An actual conflict may be found either

> when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

Fidelity Federal Savings & Loan Association, supra, 102 S. Ct. at 3022.

Although "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)), we hold that the state law authorizing Hayfield Northern to condemn CNW's abandoned railroad line for continuing rail purposes "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Thus, the state law is preempted by §10905.

III

By enacting §10905, Congress intended to "assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process." H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 125, *reprinted in* U.S. Code Cong. & Ad. News 4110, 4157. The statute is carefully tailored to accomplish that purpose, and it makes provision for continued rail service an integral part of the federal abandonment process.

Congress prescribed very precise time limits in §10905. After the Commission decides to authorize abandonment, it must publish its findings in the *Federal Register*. Offers of financial assistance, either to subsidize or to purchase, must be made within ten days following publication. §10905(c). If the Commission determines within fifteen days of publication that the offeror is financially responsible and that the amount of the offer is adequate, issuance of the certificate of abandonment is postponed pending negotiations between the parties. §10905(d). If the parties fail to agree within thirty days after the offer is made, the certificate of abandonment is issued unless either party requests that the Commission establish the conditions and amount of compensation, §10905(e), including the price and terms of any proposed sale, §10905(f)(1)(C). If such a request is made, the Commission must comply within sixty days. §10905(f)(1)(A). The Commission's decision about compensation is binding on both parties, except that the offeror may withdraw its offer within ten days of the decision. §10905(f)(2). Thus, under §10905, any arrangements for continued rail service will be complete within 110 days.

Congress was also concerned with the orderly operation of the line after its transfer. Although a subsidizer may discontinue the subsidy on sixty days' notice, a purchaser may not

transfer or discontinue service on the line for two years after the sale and may not transfer the line to anyone other than the transferor carrier for five years after the sale. §10905 (f)(4), (5).

The elaborate procedural detail of this scheme indicates that not only has Congress granted the Commission exclusive and plenary authority to regulate abandonments, *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 320 (1981), Congress has also granted the Commission exclusive and plenary authority to provide for continuation of rail service in connection with abandonments.

IV

To allow Hayfield Northern to use state condemnation proceedings to condemn CNW's right of way and track for purposes of continued rail service would frustrate the accomplishment of Congress's purpose in enacting §10905. For example, the benefits of the 110 day time schedule would be lost, since the state proceedings, once commenced,[5] could take years. Moreover, at the end of the proceedings, Hayfield Northern would have the option to walk away and not pay the award.[6] Although CNW might recover costs and attorneys' fees under Minn. Stat. Ann. §117.195 (west 1977), it could recover consequential damages, if at all, only by bringing a separate lawsuit. See *State v. Savage*, 255 N.W.2d 32 (Minn. 1977). Thus, to allow Hayfield Northern to bring a condemnation action would expose CNW to the "protracted legal proceedings" that the procedure set out in §10905 was designed to avoid.

---

[5] Hayfield Northern has not yet filed its condemnation action, for reasons we do not understand.

[6] Under Minnesota law, a condemnor may abandon the condemnation proceedings at any time before the parties' rights have "vested." See *County of Hennepin v. Mikulay*, 292 Minn. 200, 210-13, 194 N.W.2d 259, 265-67 (1972); *State v. Myhra G.M.C. Truck & Equipment Co.*, 254 Minn. 17, 18-19, 93 N.W.2d 204, 205 (1958).

In addition, to allow Hayfield Northern to condemn the 19.2-mile segment would circumvent the Commission's determination of value. If the Shippers Group wanted to own the line, they could have offered to purchase it, and the Commission, if requested, could set the price and terms of sale. §10905(e), (f)(1)(C). In fact, the Shippers Group chose to offer to subsidize, but even so, the Commission determined the net liquidation value of the line so that the amount of the subsidy could be calculated.[7] We see no reason to allow the Shippers Group, acting through Hayfield Northern, to force CNW to litigate the question of value in a state court when Congress has provided an expedited method by which sale price may be determined, especially when one determination of value has already been made.

V

Hayfield Northern and the State of Minnesota, the appellants, argue that the Commission has recognized that abandoned lines may be condemned under state authority, and that we should "give deference to the interpretation given a statute by the officers or agency charged with its administration." *South Eastern Human Development Corp. v. Schweiker*, 687 F.2d 1150, 1157 (8th Cir. 1982). We do not believe, however, that the Commission has interpreted §10905 in the manner in which the appellants contend.

In *Modern Handcraft, Inc.-Abandonment in Jackson County, Mo.*, 363 I.C.C. 969 (1981), a carrier which owned an eight-mile rail line in Kansas City, Missouri, ceased all rail operations on the line in 1968. In 1980 two noncarriers, an adjacent

[7] See *supra* note 1. Under 49 C.F.R. §1121.44(c) (1981), net liquidation value is determined by calculating the market value of the property for non-rail purposes less costs of disposing of improvements necessary to make the remaining property available for its highest and best use.

landowner and a mass transit organization, applied for a certificate of abandonment on the line. In ruling in favor of the noncarriers, the Commission said,

> We will not allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law where there is no overriding Federal interest in interstate commerce. Where as here there have been no rail operations for over 12 years and no attempt to provide rail service, we can find no public benefit in preventing a State condemnation proceeding.

Id. at 972. The appellants' reliance on this language is misplaced, however. *Modern Handcraft* involved the possibility of state condemnation of an abandoned rail line for non-rail "public purposes," not for continued rail service. The acquisition of rail property for public purposes is governed by 49 U.S.C. §10906 (Supp. IV 1980), and §10906 does not apply to the acquisition of rail property in order to continue rail service. See *Chicago & North Western Transportation Co.-Abandonment-Between Clintonville & Eland, WI*, 363 I.C.C. 975, 976 (1981). It is unnecessary for us to decide in this case whether condemnation for non-rail public purposes would also be pre-empted by federal law.

The appellants also rely on the rulemaking proceedings in *Ex Parte No. 274 (Sub-No. 6), Abandonment of Railroad Lines and Discontinuance of Service (49 C.F.R. Part 1121)*, 365 I.C.C. 249 (1981). In these proceedings the Commission noted the Association of American Railroads' "concern that prospective State purchasers with condemnation powers might, after obtaining a Commission determination of the value of a line, then seek a more favorable valuation in a condemnation action in a local court," *id.* at 260, but declined to adopt the Association's proposal that a forfeitable bond be re-

quired. This language, however, does not demonstrate that the Commission agreed with the Association's (and the appellants') interpretation of the statute. The appellants also point to the Commission's statement that

> The Commission has been granted only limited jurisdiction to direct a sale; under 49 U.S.C. 10905 we can require a sale, which will *provide continued rail service.* In all other instances, the disposition of rail property after an effective certificate of abandonment has been exercised is a matter beyond the scope of the Commission's jurisdiction, and within a State's reserved jurisdiction. Questions of title to, and disposition of, the property are the matters subject to State law.

Id. at 261 (emphasis in original). This pronouncement, however, was made in response to a suggestion that the Commission give lessors of property along the rail line the right of first refusal to buy the property. We do not believe that this language amounts to a declaration that a party who has invoked §10905 may also invoke state condemnation proceedings.

Similarly, we do not believe that *Finance Docket No. 2890F, Common Carrier Status of States, State Agencies and Instrumentalities, and Political Subdivisions,* 363 I.C.C 132 (1980), compels a different conclusion. In this proceeding the Commission exempted from regulation the acquisition by a state of rail lines approved for abandonment, when the abandonment has not been consummated. In the course of its discussion the Commission said, "When a rail line has been fully abandoned, it is no longer rail line and the transfer of the line is not subject to our jurisdiction. However, when a line has not been fully abandoned, the transfer of the line is subject to our jurisdiction." *Id.* at 135 (footnote omitted). However, the issue here is not one of ICC "jurisdiction." The fact that the Commission may not be able to regulate directly operations

on a line which has been abandoned does not mean that allowing Hayfield Northern to pursue its condemnation action will not substantially frustrate Congress's objectives in enacting §10905.

Hayfield Northern also relies on language appearing in *Chicago & North Western Transportation Co. v. United States*, 678 F.2d 665 (7th Cir. 1982), in which the Seventh Circuit agreed with the Commission that in determining fair market value in connection with a sale price under §10905(f)(1)(A), the value of the property for nonrail purposes was the relevant value. In discussing the abandonment procedures set out in the previous version of §10905,[8] the court indicated that a potential offeror "could . . . wait till the line was abandoned and then reacquire it [by eminent domain] at its nonrail value—or even condemn it before abandonment . . . ." *Id.* at 667. This statement is only a dictum, and does not show that the Seventh Circuit, on full briefing and consideration, would hold that state condemnation laws are consistent with the purpose of §10905. For reasons we have already given, we are persuaded that state condemnation for purposes of continued rail service is not consistent with that statute's aim.

VI

Accordingly, the judgment of the District Court is affirmed, and the cause is remanded to the District Court for a determination of the amount of damages due CNW on account of delay. The stay previously entered by this Court will be dissolved when our mandate issues.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[8] 49 U.S.C. §1a(6)(a) (1976), recodified as 49 U.S.C. §10905(b) (Supp. II 1978).

APPENDIX B

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1880-MN September Term, 1982

HAYFIELD NORTHERN RAILROAD,

Appellant,

vs.

CHICAGO NORTHWESTERN
TRANSPORTATION COMPANY,

Appellee,

STATE OF MINNESOTA,

Intervenor-Appellant.

This appeal from the United States District Court for the District of Minnesota was considered on a designated record from the United States District Court and on briefs of the respective parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, affirmed and remanded to the said District Court for a determination of the amount of damages due CNW on account of delay.

It is further ordered that the stay previously entered by this Court will be dissolved when our mandate issues.

December 3, 1982

(See attached sheet for cost info.)

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2/9/83
Taxation of costs in Case No. 82-1880:
Costs taxed in favor of Appellee:
Costs of reproducing brief and appendix: $167.30

Total costs of Appellee for recovery from Appellant: $167.30

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

CIVIL FILE NO. 3-82-376

HAYFIELD NORTHERN RAILROAD CO.,
Plaintiff,

vs.

CHICAGO NORTHWESTERN & PACIFIC RAILROAD CO.,
Defendant,

and

STATE OF MINNESOTA,
Intervenor.

ORDER

Robert S. Abdalian, Esq., and Paul A. Skjervold, Esq., appeared for plaintiffs.

Gilbert S. Buffington, Esq., Special Assistant Attorney General, State of Minnesota, appeared for plaintiff intervenor. Thomas E. Glennon, Esq., appeared for defendant.

This matter came on for hearing before the undersigned on June 4, 1982, upon defendant's motion for dismissal.

Defendant has moved for dismissal of plaintiff's complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. However, under rule 12(b), when matters outside the pleading are offered to and considered by the Court, the motion must be treated as a Rule 56 motion for summary judgment. Defendant here has offered an affidavit in support of its motion. Further, all parties have had reasonable opportunity to present all material pertinent to a summary judgment motion. Accordingly, the Court has considered this motion a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. *See Woods v. Dugan*, 660 F.2d 379 (8th Cir. 1981).

Based upon the pleadings, affidavit, arguments of counsel, the files and proceedings herein, the Court finds that there are no genuine issues of material fact and that the defendant is entitled to judgment in its favor as matter of law.

Plaintiff attempts to use Minnesota condemnation procedures for purposes of continuing rail service over railroad track and right of way in Dodge County, Minnesota. All parties agree that the Interstate Commerce Commission has properly allowed the defendant to abandon that portion of rail. No party questions the authority of the ICC to so act. The Commission's power to regulate abandonment is exclusive and plenary. *Chicago and North Western Transportation Co. v. Kalo Brick*, 450 U.S. 311, 101 S.Ct. 1124 (1981). As part of that abandon-

ment procedure, the Staggers Act of 1980 (49 U.S.C. §10903, *et seq.*) establishes a procedure for continued rail use in connection with abandonment. *See* 49 U.S.C. §10905. Plaintiff in this case admits that it seeks to continue service on the subject rail but attempts to avoid these federally mandated procedures. On the facts of this case, it is clear that federal law has preempted the state law as it applies to procedures seeking continued rail service in connection with an abandonment.

It is true that the Staggers Act is silent as to use of state condemnation procedures. However, the statute is quite clear as to the scheme of continuation of rail service in connection with an abandonment. The plaintiff's use of Minnesota condemnation procedures for purposes of continuing rail service on this abandoned line frustrates the express congressional intent in this area.

The Eighth Circuit Court of Appeals has enunciated a four part test to determine whether state activity in a certain area has been preempted by the federal government. *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971).

First, it is clear that the federal government possesses authority to regulate the abandonment and continuation of rail service. *Chicago and North Western v. Kalo Brick*, supra. Secondly, it is clear on the facts in this case that the use of state procedures to ensure continuation of rail service following abandonment inevitably collides with the federal scheme entailed in the Staggers Act. Applying the standards of *Northern States v. Minnesota*, state authority in this area has been preempted.

Accordingly, defendant is entitled to summary judgment in its favor, dismissing plaintiff's complaint and dissolving the temporary restraining order.

Based upon the foregoing,

IT IS ORDERED that:

1. The temporary restraining order entered in this case on March 31, 1982, by Dodge County District Court is dissolved; and

2. Plaintiff's complaint is dismissed with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 22, 1982.

PAUL A. MAGNUSON
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term 1982

No. 82-1880

HAYFIELD NORTHERN RAILROAD,
Appellant,

vs.

CHICAGO NORTHWESTERN
TRANSPORTATION COMPANY,
Appellee,

STATE OF MINNESOTA,
Intervenor Appellant.

Appeal from the United States District Court for the District of Minnesota.

The Court, having considered joint petition for rehearing and suggestions for rehearing en banc and being now fully ad-

vised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

January 18, 1983

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1880 MN
(District Court File
No. 3-82-376)

HAYFIELD NORTHERN RAILROAD
COMPANY, INC.,
Plaintiff/Appellant,

vs.

CHICAGO, NORTH WESTERN
TRANSPORTATION COMPANY,
Defendant/Appellee,

and

STATE OF MINNESOTA,
Plaintiff/Appellant,
Intervenor.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Hayfield Northern Railroad Company the appellant in this case, and the State of Minnesota, appellant/intervenor, hereby jointly appeal to the Supreme Court of the United States from the judgment of the United States Court of Appeals for the Eighth Circuit dated December 3, 1982, rehearing denied by order dated January

18, 1983, affirming the judgment of the United States District Court for the District of Minnesota dated July 22, 1982.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

21 February 1983.

Respectfully submitted,

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APPENDIX F

Title 49 USC § 10905. Offers of financial assistance to avoid abandonment and discontinuance

(a) In this section—

(1) "avoidable cost" means all expenses that would be incurred by a rail carrier in providing transportation that would not be incurred if the railroad line over which the transportation was provided were abandoned or if the transportation were discontinued. Expenses include cash inflows foregone and cash outflows incurred by the rail carrier as a result of not abandoning or discontinuing the transportation. Cash inflows foregone and cash outflows incurred include—

(A) working capital and required capital expenditure;

(B) expenditures to eliminate deferred maintenance;

(C) the current cost of freight cars, locomotives, and other equipment; and

(D) the foregone tax benefits from not retiring properties from rail service and other effects of applicable Federal and State income taxes.

(2) "reasonable return" means—

(A) if a rail carrier is not in reorganization, the cost of capital to the rail carrier, as determined by the Interstate Commerce Commission; and

(B) if a rail carrier is in reorganization, the mean cost of capital of rail carriers not in reorganization, as determined by the Commission.

(b) Any rail carrier which has filed an application for a certificate of abandonment or discontinuance shall provide promptly to a party considering an offer of financial assistance and shall provide concurrently to the Commission—

(1) an estimate of the annual subsidy and minimum purchase price required to keep the line or a portion of the line in operation;

(2) its most recent reports on the physical condition of that part of the railroad line involved in the proposed abandonment or discontinuance;

(3) traffic, revenue, and other data necessary to determine the amount of annual financial assistance which would be required to continue rail transportation over that part of the railroad line; and

(4) any other information that the Commission may deem necessary to allow a potential offeror to calculate an adequate subsidy or purchase offer.

(c) When the Commission finds under section 10903 of this title that the public convenience and necessity require or permit abandonment or discontinuance of a particular railroad line, it shall, concurrently with service of the decision upon the parties, publish the finding in the Federal Register. Within 10 days following the publication, any person may offer to pay the carrier a subsidy or offer to purchase the line. Such offer shall be filed concurrently with the Commission. If the offer to subsidize or purchase the line is less than the carrier's estimate provided under subsection (b)(1) of this section, the offer shall explain the basis of the disparity, and the manner in which the offer of subsidy or purchase is calculated.

(d) If, within 15 days after the publication required in subsection (c) of this section, the Commission finds that—

(1) a financially responsible person (including a government authority) has offered financial assistance to enable the rail transportation to be continued over that part of the railroad line to be abandoned or over which all rail transportation is to be discontinued; and

(2) it is likely that the assistance would be equal to—

(A) the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line; or

(B) the acquisition cost of that part of the railroad line; the Commission shall postpone the issuance of a certificate authorizing abandonment or discontinuance in accordance with subsections (e) and (f) of this section.

(e) If the carrier and a person offering financial assistance enter into an agreement which will provide continued rail service, the Commission shall postpone the issuance of the certificate for so long as the agreement, or an extension or modification of the agreement, is in effect. If the carrier and a person offering to purchase a line enter into an agreement which will provide continued rail service, the Commission shall approve the transaction and dismiss the application for abandonment or discontinuance. If the carrier and a financially responsible person (including a government authority) fail to agree on the amount or terms of the subsidy or purchase, either party may, within 30 days after the offer is made, request that the Commission establish the conditions and amount of compensation. If no agreement is reached within 30 days after the offer is made and neither party requests that the Commission establish the conditions and amount of compensation during that same period, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance.

(f)(1) Whenever the Commission is requested to establish the conditions and amount of compensation under this section—

(A) the commission shall render its decision within 60 days;

(B) where subsidy has been offered, the Commission shall determine the amount and terms of subsidy based on the avoidable cost of providing continued rail transportation, plus a reasonable return on the value of the line; and

(C) where an offer of purchase has been made in order to continue rail service on the line, the Commission shall determine the price and other terms of sale. In no case shall the Commission set a price which is below the fair market value of the line (including, unless otherwise mutually agreed, all facilities on the line or portion necessary to provide effective transportation services).

(2) The decision of the Commission shall be binding on both parties, except that the person who has offered to subsidize or purchase the line may withdraw his offer within 10 days of the Commission's decision. In such a case, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance, unless other offers are being considered pursuant to paragraph (3) of this subsection.

(3) If a carrier receives more than one offer to purchase or subsidize, it shall select the offeror with whom it wishes to transact business, and complete the sale or subsidy agreement, or request that the Commission establish the conditions and amount of compensation prior to the 40th day after the date on which notice was published under subsection (c) of this section. If no agreement on subsidy or sale is reached within the 40-day period and the Commission has not been requested to establish the conditions and amount of compensation, any other offeror may request that the Commission establish the conditions and amount of compensation. If the Commission has established the conditions and amount of compensation and the original offer has been withdrawn, any other offeror may accept the Commission's decision within

20 days of such decision, and the Commission shall require the carrier to enter into a sale or subsidy agreement with such offeror, if such sale or agreement incorporates the Commission's decision.

(4) No purchaser of a line or portion of line sold under this section may transfer or discontinue service on such line prior to the end of the second year after consummation of the sale, nor may such purchaser transfer such line, except to the carrier from whom it was purchased, prior to the end of the fifth year after consummation of the sale.

(5) Any subsidy provided under this section may be discontinued on notice of 60 days. Unless, within such 60-day period, another financially responsible party enters into a subsidy agreement at least as beneficial to the carrier as that which was or was to be discontinued, the Commission shall at the carrier's request, immediately issue a certificate authorizing the abandonment or discontinuance of service on the line. Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1405; Pub.L. 96-448, Title IV, § 402(c), Oct. 14, 1980, 94 Stat. 1942.

APPENDIX G

§ *10903. Authorizing abandonment and discontinuance of railroad lines and rail transportation*

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) abandon any part of its railroad lines; or

(2) discontinue the operation of all rail transportation over any part of its railroad lines;

only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Commission shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

(b)(1) Subject to sections 10904-10906 of this title, if the Commission—

(A) finds public convenience and necessity, it shall—

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions that the Commission finds are required by public convenience and necessity; or

(B) fails to find public convenience and necessity, it shall deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the abandonment or discontinuance approved by the Commission. Each certificate shall also contain provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under section 11347 of this title and section 565(b) of title 45.

(c) Repealed. Pub.L. 96-448, Title IV, § 402(a)(2), Oct. 14, 1980, 94 Stat. 1941.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1403; Pub.L. 96-448, Title IV, § 402(a), Oct. 14, 1980, 94 Stat. 1941.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1880 September Term, 1982

HAYFIELD NORTHERN RAILROAD,
Appellant,

vs.

CHICAGO NORTHWESTERN
TRANSPORTATION COMPANY,
Appellee.

STATE OF MINNESOTA,
Intervenor Appellant.

Appeal from the United States District Court for the District of Minnesota.

It is now here ordered by the Court that joint motion of appellant and appellant/intervenor to stay the issuance of mandate pending certiorari proceedings to the Supreme Court of the United States is denied.

February 9, 1983

APPENDIX I

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

February 10, 1983

Robert S. Abdalian, Esq.
103 Omni Building
1652 Greenview Drive, S.W.
P.O. Box 6390
Rochester, Minnesota 55903

RE: Hayfield Northern Railroad Company, Inc., and Minnesota v. Chicago, Northwestern Transportation Company. A-690

Dear Mr. Abdalian:

Your application for a stay in the above-entitled case has been presented to Justice Blackmun, who has endorsed thereon the following:

"Application is Denied
Harry A. Blackmun
Associate Justice
February 10, 1983."

Very truly yours,
ALEXANDER L. STEVAS
Clerk
By KATHERINE DOWNS
Assistant Clerk

gtb
cc: Counsel of record

APPENDIX J

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

February 22, 1983

Robert S. Abdalian, Esq.
103 Omni Building
1652 Greenview Drive, S.W.
P.O. Box 6390
Rochester, Minnesota 55903

RE: Hayfield Northern Railroad Company, Inc., and Minnesota v. Chicago, Northwestern Transportation Company. A-690

Dear Mr. Abdalian:

Your application for a stay in the above-entitled case has been presented to Justice Rehnquist, who has endorsed thereon the following:

"2/22/83 — Denied
WHR."

Very truly yours,
ALEXANDER L. STEVAS
Clerk
By KATHERINE DOWNS
Assistant Clerk

gtb
cc: Counsel of record

APPENDIX K

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

March 7, 1983

Robert S. Abdalian, Esq.
Ward, Gray & Oehler, Ltd.
P.O. Box 6390
Rochester, Minnesota 55903

RE: Hayfield Northern Railroad Company, Inc., et al. v. Chicago Northwestern Transportation Co. A-690

Dear Mr. Abdalian:

The Court today entered the following order in the above-entitled case:

"The application for stay addressed to Justice Marshall and referred to the Court is denied."

Very truly yours,
ALEXANDER L. STEVAS
Clerk
By FRANCIS J. LORSON
Chief Deputy Clerk

rjb

cc: Counsel of record
Robert D. St. Vrain, Esq., Clerk, U. S. Court of Appeals for the Eighth Circuit (Your No. 82-1880)
Robert E. Hess, Esq., Clerk, U. S. District Court for the District of Minnesota (Your No. 3-82-376)

APPENDIX L

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

No. A-690

HAYFIELD NORTHERN RAILROAD CO., INC.
AND STATE OF MINNESOTA
vs.
CHICAGO, NORTHWESTERN TRANSPORTATION CO.

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the request of Justice Rehnquist for the view of the United States.

The court of appeals has decided an important issue of federal law that implicates the interests of several federal agencies and involves delicate questions of federalism. The Interstate Commerce Commission, which is the federal agency empowered to administer the provisions of the Staggers Act under which this case arises, see 49 U.S.C. (Supp. IV) 10901 *et seq.*, did determine that it would not intervene or make a submission in the lower courts in this case, because it concluded that the Commission's jurisdiction and responsibilities are not threatened or adversely affected by this litigation. However, to date the Commission has not formally taken a position on the question whether Section 10905 of the Act preempts condemnation statutes such as the Minnesota statute in this case. Further, there are other federal agencies, including the Urban Mass Transportation Administration and the

Department of the Interior, that are involved in efforts by municipalities and other political subdivisions to acquire abandoned rail lines for conversion to public purposes. The issues raised by the court of appeals' decision also may implicate the interests of the Federal Railroad Administration, which currently is in the process of negotiating the sale of assets of the Consolidated Rail Corporation, which may include abandoned rail lines, to private buyers.

In view of the complexity and importance of the substantive issues considered by the court of appeals, it has not been possible to arrive at any considered judgment about them in the short time available to us. Further, we have not been able to obtain and coordinate the views of the various federal agencies whose programs may be affected by the decision of the court of appeals.

It would not be appropriate for the United States to comment on the competing equities among the private parties that are put into question by the application for a stay. However, we would point out that if a stay were granted at least until a jurisdictional statement and an answering brief were filed. we would be in a better position to evaluate both the interests of the United States in the case and the proper resolution of the important substantive issues of federalism raised by the decision of the court of appeals.

Respectfully submitted.

REX E. LEE
Solicitor General

February 1983.

APPENDIX M

BEFORE THE
INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 274 (SUB-NO. 6)

ABANDONMENT OF RAILROAD LINES AND
DISCONTINUANCE OF SERVICE
(49 C.F.R. Part 1121)

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

JAMES I. COLLIER, JR.
Attorney for the
Association of American
Railroads
1920 L Street, N.W.
Washington, D.C. 20036
Due Date: December 26, 1980

BEFORE THE
INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 274 (SUB-NO. 6)

ABANDONMENT OF RAILROAD LINES AND
DISCONTINUANCE OF SERVICE
(49 C.F.R. Part 1121)

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads (AAR), on behalf of its member railroads,[1] respectfully submits the following comments in response to the Commission's Notice of Interim Rules and Request for Comments served on November 25, 1980, and published on the same date in the *Federal Register* at pages 78144-78151. By its Notice the Commission has established interim rules, and is seeking comments on such rules as permanent rules, to implement Section 402 of the Staggers Rail Act of 1980, Pub. L. 96-448. The most significant changes in the law affecting abandonments are the new deadlines for the Commission to render decisions on abandonment applications. The Staggers Act clearly reflects Congressional intent to speed up the Commission's abandonment and discontinuance processes.

Congress also has provided the Commission with the discretion whether to investigate or not to investigate applications for abandonment or discontinuance, and in doing so directed the Commission to make an initial determination whether or not the pleadings at the application and protest stage require any further proceedings. This mandate to the Commission to determine whether or not to investigate an abandonment requires only an analysis of the application and protest data, and precludes the use of modified procedure for such determination.

In order to make this initial determination the Commission should have before it protests containing specific and sufficient information to rebut the detailed and verified data re-

[1] These comments are filed on behalf of member railroads which are not filing individual comments in this proceeding.

quired in an abandonment or discontinuance application. Too often in the past the Commission has entertained protests of a general and nonspecific nature which led to modified or oral proceedings which often dragged on for a year or more with no public or administrative purpose being served. In order to avoid these kinds of situations, Congress has now directed the Commission to make an initial determination whether to investigate or not to investigate. This mandate, coupled with the procedures now applicable following an authorized abandonment whereby those who are interested in preserving uneconomic rail service for local benefits have an opportunity to acquire or to subsidize the continued operations of the line, and the Commission's new authority to set the purchase price (Ex Parte No. 395), reflects Congressional determination that local interests will be amply protected in the event of the Commission's determination not to investigate.

RECOMMENDED AMENDMENTS TO THE RULES

Section 1121.36(a)(1)(iii).

This section requires "[s]pecific reason(s) for opposing the abandonment or discontinuance, including information with respect to protestants' reliance on the involved service . . ." Just "information" is too general—more specific data from shippers and others who have a desire to express their interest must be required. Specific data is necessary to assist the Commission in its determination whether to investigate or not to investigate. It is the AAR's view that normal shipper information required in the Commission's usual order regarding modified procedure should be required. For example, the number of carloads shipped or received; the names and extent of usage of motor carriers; information regarding the capacities of the plant—whether it be a fertilizer operator, grain elevator, or other; the nature of the business of the protestant;

the extent to which the protestant uses for-hire or private trucking; the commodities and/or services dealt in by the protestant; modes and methods of transportation to be used if the line is abandoned; etc. By requiring this "information" at the protest stage, the Commission would have a better and more detailed picture of the interests of protestants for making the determination directed by Congress.

If the Commission adopts this recommendation for more specific information, an amendment would be required in §1121.31. The notice of abandonment should contain reference to the required information by any protestant with the following language included:

> Persons who wish to file a protest are cautioned that they must observe the above designated requirements of the Commission. Failure to do so may result in the Commission's rejecting the protest, or in the alternative determining not to investigate the abandonment.

The requirement that any person desiring to protest an application must provide specific information is consistent with the new authority provided to the Commission to investigate or not to investigate applications. As the Commission well knows, detailed factual data is required of the carriers in filing such applications. There is no valid reason for the Commission to make its determination whether to investigate or not to investigate on general and nonspecific information in protests. Any protestant who continues to file such protests should do so at its peril in light of the Congressional intent for the Commission to expedite the abandonment procedures. *Section 1121.36(c)(1).*

In light of the Congressional intent to expedite abandonment proceedings, the AAR also recommends that this section be amended to require that conforming protests be filed with

the Deputy Director of the Section of Finance and served upon the applicant by expedited mail within 30 days of the filing of an abandonment application. The applicant should be permitted 5 days from the date of receipt of the written comments or conforming protests within which to file a reply with the Commission. This would give the Commission a minimum of 10 days within which to determine whether to investigate or not to investigate based on data contained in the application, verified protests (containing specific information), and replies thereto.

Section 1121.36(d)(4).

This section provides that no motions to strike or requests for cross-examination would be permitted under modified procedure. No doubt the underlying reasons for the Commission's determination not to allow motions to strike or cross-examination in connection with modified procedure arise in part from the expedited timetable involved. In part, the no-strike or cross-examination provision could also arise from a perception by the Commission that the emphasis has somewhat been shifted from disagreement over factual issues involving the substance of an abandonment to the more relaxed exit philosophy expressed by Congress in the Staggers Act. It should be remembered, however, that the proceedings involved in abandonment cases are not in the nature of rulemaking, but are in the nature of quasi-adjudicative proceedings dealing with specific facts and issues involving a specific line, a specific railroad and specific protestants.

Meaningful modified procedure requires that misleading, irrelevant, and improper data, and indeed data that does not comply with the rules of evidence, be stricken. Due process of law requires no less. Therefore, we believe that §1121.36 (d)(4) should be amended to allow for motions to strike and, where appropriate, cross-examination. If the Commission as-

signs a matter for modified procedure, the full safeguards of the Administrative Procedures Act require that motions to strike and, in appropriate cases, requests for cross-examination be allowed. These safeguards are even more necessary when it is remembered that abandonments, much like the passenger discontinuance cases of old, often involve a good deal of emotional diatribe not calculated to define and develop issues.

Section 1121.36(d)(5)(B)(ii).

This section should be clarified so as to assure the parties that cross-examination of protestants' witnesses by applicant's attorney at any oral proceeding would be allowed. This section provides that oral hearings shall be for the primary purpose of cross-examination of witnesses filing verified statements pursuant to §1121.36(b)(5)(A), which is applicable only to applicant's initial verified statements and *not* to protestants' verified statements. Thus, counsel for the applicant could technically be denied the right of cross-examination during oral hearings. The AAR does not believe that this result was the intent of the Commission, and the rule ought to be amended.

Section 1121.38(c)(1)(i).

In connection with the filing of offers, the Commission's proposed rule should require that any offer filed prior to an administratively final decision authorizing abandonment should be refiled in accordance with §1121.38(c)(1)(ii) to start the time requirements running in accordance with the deadlines provided for under the Staggers Act. While early offers are obviously to be encouraged, nevertheless the Staggers Act provides certain time frames within which the Commission must act following an administratively final decision authorizing abandonment. In order to set those time limitations any offer that was filed prior to an administrative final

decision authorizing abandonment should be refiled to set the procedural mechanisms in motion. Refiling would also be of assistance to the Commission in its docketing procedures, so that it would be aware of the time limits and the running of the various time frames for various determinations following the administratively final decision authorizing the abandonment.

Section 1121.38.

The AAR recommends changes in the requirements of offers for financial assistance when a state or state agency is involved. We pointed out in the industry's recent Comments in Ex Parte No. 395, that some states have available to them various condemnation procedures which would in effect provide for the same results as do the federal regulations. Nothing prevents a state from exercising its rights under the Staggers Act and then walking away from the proceeding or decision of the Commission regarding the valuation or purchase price, and beginning a condemnation proceeding in a local state court seeking favorable treatment by such court. Indeed, the statute itself allows a state or state agency to walk away from a Commission determination on value for purposes of acquisition. The State of Wisconsin, for example, under pre-existing regulations refused to agree to a carrier determination of purchase price, notwithstanding the fact that price was the salvage value placed in the record by the carrier and upon which certain costs were calculated in accordance with the Commission regulations. After the six-month provision lapsed, the state commenced a condemnation action in a local court seeking a more favorable valuation than the carrier presented to the Commission. Nothing exists to prevent this kind of activity under the Staggers Act. However, the Commission could do something about it with its wide discretion in promulgating its rules and regulations.

Therefore, it is recommended that in connection with financial offers of assistance or purchase under §1121.38, the Commission should require that the offeror indicate whether or not it is a state or state agency and whether or not it has condemnation powers. If so, as recommended in Ex Parte No. 395, the offer must be accompanied by a 25 percent payment to the carrier of the estimated purchase price which may be retained by the carrier in the event the state or state agency offeror declines to exercise its rights under a Commission determination of value. The rule also should provide that such deposit shall not be considered as a prepayment for any value determined by any subsequent condemnation procedure commenced by the state or state agency in state or federal courts. *Section 1121.38(m)(2).*

Essentially, this provision states that if a carrier is dealing with one of several offerors and neither the applicant or the present offeror invokes the Commission's jurisdiction for determination of purchase or subsidy, the second offeror then has 10 days additional after the initial 30-day period to invoke the Commission's jurisdiction. This rule is not based upon on any provision in the Staggers Act, and there is no other basis in law for such a rule. Indeed, in light of the strict time requirements imposed by Congress such a provision would be contrary to Congressional intent. The only option available for multiple offerors to invoke is for one of them to invoke the Commission's jurisdiction within the time frame prescribed, regardless of whether or not the carrier is dealing with that particular offeror at the moment. The purchase price determination would be applicable regardless of what offeror became the actual owner.
Section 1121.38(m)(3).

The industry believes that the 20-day provision is excessive. The statute provides an offeror with an option to walk away

within 10 days of the Commission decision. No sound reason, administrative or otherwise, exists for doubling that time. By the tenth day both the Commission and the applicant will be aware of whether or not the offeror intends to exercise the purchase price determination by the Commission.

Section 1121.38(p).

Congress did not contemplate nor does the Act require that a carrier and purchaser enter into a creditor-debtor relationship. Nowhere in the Act, Conference Report or Committee comments is there any condition for the price of eliminating burdens on commerce to be paid by a forced debtor-creditor relationship. A carrier runs a substantial risk of having a non-state applicant default on its payments, particularly where the Commission's financial responsibility regulations, as administered in the past, tend to be rather lenient. In light of the bankruptcies of several carriers, and in light of the difficulties encountered in collecting debts in bankruptcy proceedings, the Commission cannot require a forced debtor-creditor relationship between an applicant and a proposed purchaser. There is no statutory basis for imposing the risk of a defaulting purchaser upon a carrier.

We are not dealing here with inconsequential matters, for what is at issue is the sale and ownership of property, both real and personal. In this light the following change in §1121.38(c) is recommended:

Section 1121.38(c)(2)(iii).

This section should be amended to provide that the offeror indicate by clear and convincing evidence that it has or within a short, reasonable period will have the financial resources to pay cash or the cash equivalent for the net liquidation value of the line as contained in applicant's salvage statements submitted in its application. This requirement would not prejudge the valuation of the line but would provide some assurance

that any prospective offeror has the ability to make a cash payment of a substantial amount to avoid a forced debtor-creditor relationship upon the applicant as a condition of eliminating a burden on commerce.

"Binding" Commission Decision of Value.

The abandonment provisions of the Staggers Act, particularly those sections that deal with Commission authority to set purchase price valuation following administrative determination of abandonment, in effect make the Commission a legislative condemnation tribunal. Such authority is generally unknown under our system of goverment. Issues relating to the legality of such authority are not appropriate matters for argument before the Commission. However, the language of the Staggers Act relating to the Commission's determination of a value being binding does not mean that an aggrieved carrier who believes its property has not been properly valued by any such decision does not have the right of appeal. The industry believes and the legislative history supports the inference that such language meant that the binding nature of the decision relates only to price.

The recommendations made herein by the AAR are in no way intended to indicate that any rail carrier has waived any of its rights with respect to the legality of the statute or any future Commission determination thereunder. The recommendations have been made to facilitate the Commission's administrative process under the proposed rules.

Respectfully submitted,

JAMES I. COLLIER, JR.
Attorney for the
Association of American
Railroads
1920 L Street, N.W.
Washington, D.C. 20036

Due Date: December 26, 1980.

APPENDIX N

OFFICE OF THE GENERAL COUNSEL

No. 82-166 April 27, 1982

MEMORANDUM TO CHAIRMAN TAYLOR:

Re: Request for Commission Intervention in District Court Case Related to Docket No. AB 1 (Sub-No. 113)F, Chicago & North Western Transportation Co. —Abandonment Between Oelwein, Iowa and Randolph, Minnesota.

On April 5, 1981, Assistant General Counsel Stuart F. Gasner of the Chicago and North Western Transportation Company ("CNW") wrote to you and to me to ask the Commission to intervene in a case in federal district court that is related to the Commission's decision authorizing CNW to abandon a branch line in Minnesota and Iowa.[1] The purpose of this memorandum is to advise you that we recommend against the Commission's participation. We reach this conclusion for two reasons. First, we do not believe that CNW's position—that federal law (49 U.S.C. 10905) preempts condemnation of the branch line under state law after the issuance of a certificate of abandonment—is correct. Second, we see no substantial interest within the jurisdiction of the Commission which would

[1] Docket No. AB 1(Sub-No. 113)F, Chicago & North Western Transportation Co.—Abandonment Between Oelwein, Iowa and Randolph, Minnesota, served October 9, 1981, petition for review dismissed sub nom., *Brownsdale Cooperative Ass'n, et al. v. ICC*, No. 81-2333 (8th Cir. January 14, 1982) (circulated in G.C. Memorandum No. 82-18).

I have sent a letter to Mr. Gassner informing him that his request that the Commission participate in the new district court case is under consideration.

warrant our intrusion into this sensitive area of federal-state relations. Accordingly, we recommend that the district court resolve the issue without the participation of the Commission.

FACTS

In January 1981, CNW applied for authority to abandon a 44 mile branch line in Minnesota and Iowa. In July 1981, an Administrative Law Judge granted the application. Protestants that were shippers on the Minnesota segment of the line appealed the ALJ's decision insofar as it authorized abandonment of a 19 mile segment in Minnesota.

Pursuant to 49 U.S.C. 10905, the Minnesota shippers made an offer of subsidy for the 19 mile segment. Under that section, if the Commission finds that the subsidy offer or purchase price offer of a financially responsible person meets the standards of 49 U.S.C. 10905(d), it postpones the issuance of a certificate of abandonment. The parties may request the Commission to determine the purchase price or the conditions and amount of subsidy. The Commission's decision is binding, except that the person who offered the subsidy or purchase may withdraw his offer within ten days of the Commission's decision. 49 U.S.C. 10905(f).

In October 1981, the Commission affirmed the ALJ's decision. It withheld the certificate of abandonment while the Minnesota shippers' subsidy offer was pending. On request, the Commission determined that the subsidy should be $360,000 annually and that the 19 mile segment was worth $1.5 million. The Minnesota shippers thereafter withdrew their subsidy offer.

In November 1981, the Commission issued the certificate of abandonment. The Minnesota shippers filed a petition for judicial review. The Commission denied the shippers' request for a stay pending judicial review. The shippers thereafter

sought a stay pending review in the United States Court of Appeals for the Eighth Circuit, which also denied the request.

CNW effected abandonment on December 17, 1981. The Minnesota shippers subsequently voluntarily sought dismissal of their petition for review in the Eighth Circuit, which granted dismissal on January 14, 1982.

On March 31, 1982, the Minnesota shippers formed a corporation, the Hayfield & Northern Railway Company ("H &N"). H&N filed a condemnation action under state law in a Minnesota state court, seeking to condemn the 19 mile segment for continued use as a railroad. H&N also sought a temporary restraining order ("TRO") preventing CNW from removing the rail, ties, and bridges on the segment pending the condemnation action. On April 2, 1982, the state court granted the TRO. Pursuant to 28 U.S.C. 1441, CNW removed the condemnation action to the United States District Court for the District of Minnesota, Civ. No. 3-82-376.

CNW stated in its letter that it has negotiated a contract to sell the rail from this abandoned line to the State of Iowa for use in a project to upgrade track near Ames, Iowa. CNW also informed me that it has negotiated a lease for a small portion of the 19 mile segment to Cargill, Inc. the TRO interferes with these agreements.

CNW's request that the Commission intervene

CNW believes that 49 U.S.C. 10905 provides the exclusive means by which parties may continue rail service on a line that a railroad has been authorized to abandon. It argued unsuccessfully in the state court TRO hearing that Section 10905 preempts the state condemnation proceeding and that the proceeding is an improper collateral attack on the Commission's determination of the line's value.

CNW stated that it expects the Attorney General of Minnesota to intervene on behalf of the shippers and has asked the

Commission to intervene on behalf of CNW's position that federal law (49 U.S.C. 10905) preempts the condemnation action based on state law.

DISCUSSION

There is some appeal to CNW's argument that Section 10905 provides the exclusive means by which a party may continue rail service in lieu of abandonment, and thus preempts a state law condemnation action even after abandonment has occurred. However, we believe the shippers have the best of the argument, and that once a rail line has been abandoned, Section 10905 can no longer be viewed as preempting a state law condemnation.[2]

It is well settled that the states may exercise concurrent or independent powers with the federal government unless: (1) the Constitution places the power exclusively in the federal government; (2) the power given the federal government is prohibited to the states; or (3) by its nature and subject, the power must be exercised by the national government. *Gilmann v. Philadelphia*, 70 U.S. (3 Wall.) 713, 730 (1865). In examining situations in which federal and state laws may conflict, the courts attempt to reconcile the operation of both statutory schemes rather than hold the state action to be preempted. See *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973). When the federal government has not specifically precluded state legislation in a certain area, a state may exercise its power to regulate a subject within that area which is local in nature (as opposed to national and requiring uniform rules), so long as its regulation is not unduly burdensome on interstate commerce. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960). Of course, to the extent federal and

[2] We have no doubt that prior to the issuance of a certificate of abandonment a state condemnation action will not lie.

state laws or regulations are inconsistent, the constitutional act of Congress supersedes all inconsistent state legislation. U.S. CONST. art. 6; see *Huron Portland, supra*, 362 U.S. at 442.

In the Supreme Court's view, the state condemnation statute should be read so as not to conflict with the federal statute—49 U.S.C. 10905. In this case, it is possible to view the state statute providing a condemnation action as not conflicting with Section 10905. Section 10905 proceedings end when the certificate of abandonment issues and abandonment occurs. Where, as here, a party files a condemnation action after a rail line has been abandoned, the action under state law does not interfere with the Commission's determination under Section 10905.

CNW argues that in this case, if the district court (acting under state law) sets a value for the line that is lower than the purchase price that the Commission established, then the action based on state law would conflict with the federal statute, 49 U.S.C. 10905. We disagree.

10905 (F)(1)(C) that when the Commission establishes a purchase price under Section 10905, "[i]n no case shall the Commission set a price which is below the fair market value of the line . . ." Section 10905 can be read as obligating only the Commission (and not a court) to set a price at a certain level when a party invokes Section 10905 to avoid abandonment. A court need not set the same price when it later determines value under a state condemnation statute after the line in question has been abandoned.[3] Nor does an injunction re-

[3] There are good reasons for a court, acting under state law, to set a different value for the line than the Commission. Under Section 10905, the Commission determines the fair market value of a line that is in service. After abandonment occurs, the shippers on the

quiring the premises which are the subject of the condemnation proceeding to be kept intact pending the outcome of that proceeding interfere with Commission jurisdiction so long as it does not impose any obligation upon the railroad to continue operations over a line which the Commission has authorized the railroad to abandon. The Commission has in other contexts advised states desiring to condemn rail property for non-rail use that the proper course is to obtain a certificate authorizing abandonment from the Commission prior to instituting condemnation proceedings. We see no reason to arrive at a different result because condemnation is sought for rail purposes and the parties seeking to effect the condemnation have previously resorted to the procedures set out in Section 10905.

In view of the Supreme Court's direction to read federal and state statutes so as to avoid a conflict, we conclude that a prior resort to Section 10905 does not preempt a condemnation action under state law after the Section 10905 procedures have been exhausted and the line abandoned. The federal district court undoubtedly is aware of the doctrine of preemption and can reach the correct result without the Commission's participation.

I note, however, that the Commission has addressed the preemption issue in a different context in language that could be read to apply to this case. In Ex Parte No. 395, *Feeder Railroad Development Program*, 365 I.C.C. 93 (1981), the Commission promulgated rules to implement Section 401 of the

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line may have turned to other means of transportation, and the constitutional value of the line may therefore be lower than the price the Commission set. The state condemnation statute may also incorporate a valuation standard which leads to a higher price than Section 10905's "fair market value" standard. See, *e.g.*, *In Re Port Authority Trans-Hudson Corp.*, 20 N.Y. 2d 457, 285 N.Y.S. 2d 24, 231 N.E. 2d 734 (1967), *cert. denied*, 390 U.S. 1002 (1968).

Staggers Act. That section added new 49 U.S.C. 10910, which provides that upon the application of a financially responsible person, the Commission may require the rail carrier that owns a rail line to sell the line "at a price not less than the constitutional minimum value." The provision applies in two cases: (1) when the public convenience and necessity require or permit the sale of the line, or (2) when a rail line has been placed on a system diagram map but before the rail carrier has filed an application to abandon the line. See 49 U.S.C. 10910(b).

The Commission stated in the text accompanying the rules that when a party invokes the feeder rail development procedure, then a state condemnation proceeding will not lie:

> The Association of American Railroads (AAR) is concerned that a prospective state purchaser dissatisfied with our valuation of the property could "walk away" from the proceeding and start a condemnation proceeding under that state's jurisdiction with the hope of obtaining a more favorable determination of value by a local court.
>
> States may not exercise eminent domain powers as a vehicle to circumvent a federally-mandated statutory scheme under which we are granted exclusive jurisdiction to require a railroad to cease operations over one of its rail lines or to transfer the line to a new operator. *There is no legal capacity in any state to alter the status of a common carrier* insofar as its interstate obligations are concerned; such capacity lies wholly within the federal jurisdiction. * * *
>
> Upon invoking our jurisdiction, the party's only remedy if dissatisfied is to seek judicial review in a United States Court of Appeals pursuant to 28 U.S.C. 2321a and 2342 * * * (Emphasis added).

CNW indicated to us that it views the quoted language as giving the Commission's analysis that a state condemnation action will not lie if a party invoked the Commission's determination of a subsidy under 49 U.S.C. 10905. The Ex Parte 395 decision by its terms, however, applies only to proceedings invoked under 49 U.S.C. 10910—the feeder rail development provision.

We believe that there is a good reason to view the Ex Parte No. 395 language as not applying to this case. In the quoted section of the decision, the Commission showed its concern that a state may not alter the status of a "common carrier." Once a rail carrier has abandoned a line, it no longer is a common carrier subject to Commission jurisdiction as to that line. Therefore, a state condemnation action that occurs after a carrier abandoned a line would not alter the carrier's status as a common carrier. If service is to be reinstated over the line following its acquisition by condemnation, a certificate would have to be obtained by the new operator under 49 U.S.C. 10901.

CONCLUSION

We recommend that the Commission not participate in the district court condemnation action. If, however, the Commission wishes to participate, we recommend that it authorize us to take the position that a Commission decision under Section 10905 establishing a subsidy or purchase price for purposes of that section does not preempt a subsequent condemnation proceeding under state law. CNW intends to file a motion to dismiss the condemnation action, based on its theory that federal law preempts the action, during the week of April 26. Accordingly, we request that you advise us of the Commission vote on whether to participate by May 4, 1982. We will inform Mr. Gassner by letter of the Commission's decision and, if the decision is to participate, take the necessary steps to secure our participation.

Sufficient copies are attached to allow distribution to the entire Commission.

JOHN BROADLEY
General Counsel

Attachments
cc: Director Hardy
Acting Deputy Director Gitomer
Clearance Unit

APPENDIX O

OFFICE OF THE GENERAL COUNSEL

No. 82-524 December 22, 1982

MEMORANDUM TO CHAIRMAN TAYLOR:

Re: Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880
(Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co.—Abandonment Between Oelwein, Iowa and Randolph, Minnesota)
Prior G.C. Memoranda Nos. 82-166 to 82-323

This is to inform the Commission of a decision in which the United States Court of Appeals for the Eighth Circuit held that 49 U.S.C. 10905—the provision of the Act for offers of assistance to avoid abandonment—preempts a court action under state law to condemn for continued railroad use a rail line that was abandoned pursuant to a Commission decision.[1]

BACKGROUND

After the Commission authorized the Chicago and North Western Transportation Company ("CNW") to abandon a

[1] When the Commission voted not to participate in this court action, it asked that we inform it of significant developments.

144-mile branch line in Minnesota and Iowa, certain Minnesota shippers made an offer of subsidy pursuant to 49 U.S.C. 10905 for a segment of the line.[2] On the shippers' request, the Commission calculated the net salvage value of the segment in order to to establish the subsidy terms. The shippers thereafter withdrew their subsidy offer, the certificate of abandonment issued, and CNW ceased operations on the line.

After operations ceased, the Minnesota shippers filed an action under state law to condemn the segment for continued use as a railroad. The district court dismissed the action on the ground that Section 10905 preempts a subsequent state law condemnation action for purposes of continued rail service because the Commission's power over rail abandonments is exclusive and the condemnation action interfered with that power (see prior G.C. Memorandum No. 82-323).

THE COURT OF APPEALS DECISION

The Court of Appeals affirmed the district court. It is significant to note that the court did not find preemption based on the fact that the Minnesota Shippers had invoked Section 10905 by offering to subsidize the line. Rather, the Court held that the existence of Section 10905 preempts a state law authorizing condemnation of an abandoned rail line for continued railroad purposes (slip op. 5).

The Court found (slip op. 7) that the "elaborate procedural detail" of section 10905 indicates that Congress "granted the Commission exclusive and plenary authority to provide for

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[2] Under Section 10905, a financially responsible person may offer to subsidize or purchase a line that the Commission has authorized the railroad to abandon. If the offeror and the railroad cannot agree on terms, either may request the Commission to establish them. 49 U.S.C. 10905(e). The agency's terms are binding except that the offeror may withdraw its offer within ten days. 49 U.S.C. 10905(f)(2).

continuation of rail service in connection with abandonments." The court reasoned that state law condemnation proceedings, which are often lengthy, would interfere with the explicit time limits in Section 10905 for disposing of offers to purchase or subsidize lines about to be abandoned (slip op. 7).[3] The court noted (id.) that in enacting Section 10905, Congress intended to avoid such protracted legal proceedings. The court also found that the state law condemnation action would circumvent the Commission's determination of the value of the line (slip op. 8).

In a lengthy discussion of Commission decisions (slip op. 8-11), the court rejected the Minnesota shippers' argument that the Commission has recognized that abandoned lines may be condemned under state law. The court found (slip op. 9) that the agency's decision in *Modern Handcraft, Inc.—Abandonment in Jackson County, Mo.*, 363 I.C.C. 969 (1981) involved the possibility of a state law condemnation of an abandoned rail line for non-rail public purposes, which is governed by Section 10906 rather than Section 10905. The court did not rule on whether condemnation for non-rail public purposes would also be preempted by federal law.

The decision is another in a line of cases, including *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), in which courts have held that the Commission's power over rail abandonment is exclusive and plenary.

INTERVENTION REQUESTS

In prior G. C. memorandum No. 82-166, we recommended that the Commission did not intervene in this case before the

[3] The court calculated (slip op. 6) that under the time limits of Section 10905, any arrangements for continued rail service will be complete within 110 days.

district court in behalf of CNW's view that Section 10905 preempts a state law condemnation action for continued rail use. We continue to believe that a reasonable case can be made that the existence of Section 10905 does not preempt all such state law actions.

The Eighth Circuit's opinion appears to be contrary to the philosophy of a recent decision of the District of Columbia Circuit that affirmed the Commission's modified certificate program allowing states and their contractors to start and terminate rail service without Commission approval, *Patrick W. Simmons v. ICC*, No. 81-2009 (D.C. Cir., Dec. 14, 1982).[4] The *Simmons* court noted that states have strong interests in retaining local rail service. The Eighth Circuit's opinion that Section 10905 preempts a state law condemnation action for continued rail service could become an obstacle, in some situations, to retaining local rail service because it prevents a private entity such as HN from using a state law to condemn a rail line for continued rail use.

HN will seek rehearing of the Eighth Circuit's decision. Several states have informed us that they intend to support HN's request and have asked the Commission similarly to support it. We recommend that the Commission not intervene in support of the petition for rehearing. We have remained neutral to this point and do not believe that intervention is wise unless there are compelling reasons why the Eighth Circuit's decision will cause problems for the Commission. We understand that the Office of Procedures believes that the decision will pose problems. They will submit their views directly to the Commission. Whatever those problems are, they should be weighed against the problems for the Commission

[4] The Simmons decision will be circulated in the near future.

and the railroads, pointed out by the Eighth Circuit, in having protracted condemnation proceedings interfering with Commission proceedings.

Should the Commission disagree with our recommendation not to intervene and wish to support the petition for rehearing, it should inform us on December 27, 1982, which is the date for HN's filing its petition for rehearing.

Sufficient copies are attached for distribution to the Commission.

JOHN BROADLEY
General Counsel

Attachments
cc: Director Hardy
Director Gitomer
Attorney W. Michel
Clearance Unit

APPENDIX P

OFFICE OF PROCEEDINGS
HAYFIELD NORTHERN RAILROAD CO., INC. v. CHICAGO AND NORTH WESTERN TRANSPORTATION CO., U.S.C.A. 8th Cir., NO. 82-1880.
(RELATES TO DOCKET NO. AB-1 (SUB-NO. 113F), CHICAGO AND NORTH WESTERN TRANSPORTATION CO.-ABANDONMENT BETWEEN OELWEIN, IOWA AND RANDOLPH, MINNESOTA)
SEE G. C. MEMORANDA NOS. 82-524, 82-323 AND 82-166.

December 27, 1982

MEMORANDUM TO THE COMMISSION:

On December 3, 1982, the Eighth Circuit issued a decision finding that the offer of financial assistance procedures of 49 U.S.C. 10905 preempt State condemnation laws used to com-

demn rail properties after abandonment in order to continue rail service. The decision grew out of an attempt by a Minnesota railroad company to comdemn Chicago and North Western Transportation Company's (CNW) abandoned rail property for continued rail use.

At the time the suit was filed CNW requested the Commission to intervene on its behalf. The Office of the General Counsel recommended against intervention for two reasons: (1) it disagreed with CNW's argument that federal law preempts condemnation under State law *after* abandonment; and (2) it expressed the view that there was not enough Commission interest in the case to warrant intrusion into the "sensitive area of federal-state relations". This office shared those views.

Since the Court's decision finding in favor of CNW the Commission has again been asked to intervene; this time by State interests seeking to have the decision overturned. The Office still thinks there is not Federal preemption under these circumstances, but does not recommend Commission intervention. Instead, this memorandum is to inform the Commission of the probable impact of the Court's decision an to the Commission's jurisdiction under 49 U.S.C. 10905. Preliminarily the Court's decision appears to be contrary to the intent of section 10905 that local shippers and communities to be allowed to acquire rail properties for continued rail service. Section 10905 set forth an extensive statutory plan for such sales *before* abandonment becomes effective, but there is nothing in the statute to suggest a federal interest in the property once abandonment is consummated. As a result, a state condemnation action will lie only after the carrier has ceased service. Thus, the only harm to a carrier by a forced sale after abandonment is the opportunity cost of keeping the assets on the line while the condemnation action proceeds. It

appears that this problem can be easily remedied by the *States* requiring a bond or by adding opportunity cost damages, if any, to a condemnation award. However, there appears to be *no* Federal interest in the property once it is abandoned. Thus, section 10905 should not preempt State condemnations.

This decision may also impact on the Commission's handling of section 10905 proceedings. For example, a party seeking primarily to subsidize operations also may also offer to purchase the line concurrently with its subsidy offer. If it does not, it may be faced with either accepting the subsidy terms or buying the line from the carrier at whatever price the carrier sets (Congress acknowledged the problems of this later option by establishing the forced sale provisions in section 10905 and the feeder line provision 49 U.S.C. 10910). However, if the offeror makes both a purchase and subsidy offer, and the Commission does not require a choice between the two options as it currently does, the Commission will be required to set terms in two different types of cases. Another result of the Court's decision may increase the Commission's workload, without increasing the time in which the Commission must perform its analysis.

Another problem concerns rail banking. Under this concept, numerous states have been acquiring abandoned rail properties through condemnation for future rail use. The Court's decision appears to preempt the use of State condemnation law for acquisition of rail properties for rail banking—even though the Commission has held that section 10905 offers for rail banking would not be considered. If, on the other hand, State condemnation laws could be used to acquire properties for rail banking, States are encourged to tell the Commission and Courts that they are using their condemnation power for rail banking, and then immediately put the acquired property to rail.

Similarly, the Commission has no jurisdiction to consider a section 10905 offer to acquire a spur line. If the Court's decision is read broadly, the State could not condemn such property, and there would be no means, absent private negotiations, for shippers and communities to readily acquire spur trackage.

A final issue concerns the length of the preemption. It is not uncommon for abandoned track to remain in place for months prior to salvage. If that situation prevails, are we to assume that a State could not condemn that property for rail use months after abandonment is effectuated?

In conclusion, the problems with the Court's decision arise out of the Court's failure to distinguish pre-consummation actions from post-consummation actions. It is our opinion that following consummation of an abandonment, there is *no* remaining Federal interest in the line (unless certain conditions were imposed) and State laws, providing for condemnation so that communities and shippers retain rail service, should be favored.

HEBER P. HARDY
Director
RICHARD LEWIS
Associate Director

APPENDIX Q

INTERSTATE COMMERCE COMMISSION
Washington, D.C. 20423

February 18, 1983

Mr. Paul Bator
Office of the Solicitor General
Department of Justice
Washington, D.C. 20530

Re: Hayfield & Northern Railroad Co., Inc. v. Chicago & North Western Transportation Co., No. 82-1880 (8th Cir. December 3, 1982)— Petition For Stay

Dear Mr. Bator:

This responds to your request for the views of the Interstate Commerce Commission on the request of the Hayfield Northern Railroad Company to Justice Rehnquist for a stay of the court of appeals decision pending Hayfield's petition for a writ of certiorari.

The views set forth below are my own and not necessarily those of the commission. I have asked the Commissioners to notify me by close of business on February 18, 1983 whether they endorse my views and I will inform you as soon as they have completed voting.

I will address only one of the criteria that a court considers when deciding whether to issue a stay: likelihood of success on the merits.

The court of appeals found that 49 U.S.C. 10905—a provision of the Interstate Commerce Act, which is administered and enforced by the commission—preempts a state law condemnation for continued rail purposes of a rail line abandoned

pursuant to Commission authority. But the Commission consciously did not participate before the district court or the court of appeals in this case because neither the state law condemnation action nor preclusion of such an action affects the Commission's exercise of its power to regulate the abandonment of service, including the provisions of section 10905. The court of appeals correctly noted that that power is plenary and exclusive, citing *Chicago and North Western Trans. Co. v. Kalo Brink & Tile Co.*, 450 U.S. 311 (1981). Once abandonment has taken place pursuant to Commission authority, however, the Commission's interest in the rail line has ceased because the line has been found not to be required in interstate commerce.

The fact that the court of appeals decision does not affect the Commission's interests does not mean that other federal government agencies have no interest in the decision. The Department of Transportation may well have an interest because it provides subsidies and other assistance to enable state governments and their political subdivisions to continue rail service on lines that are about to be or have been abandoned. The court of appeals in this case has foreclosed one important means by which states may help to continue rail service without relying on federal subsidies—by allowing condemnation of abandoned rail lines for continued railroad use.

I believe that the court of appeals' holding presents a significant Tenth Amendment issue because it interferes with the State's choice of purposes for which it authorizes use of an integral governmental function—the power of eminent domain. The condemnation of rail lines for continued rail purposes under a state law is not to be confused with a state's running a railroad, which the Supreme Court has held is not an integral governmental function protected from regulation

by the Tenth Amendment. *United Transportation Union v. Long Island R. Co.*, 102 S. Ct. 1349 (1982). Moreover, the court's decision prevents a state from treating certain property within its borders the same as all other property (which is subject to condemnation) on the ground that the property once was a rail line regulated by the federal government.

I also believe that the conclusion of the court of appeals that Section 10905 precludes state law condemnation actions for continued rail purposes is not necessarily warranted. Under long-established precedent, the Supreme Court declines to find preemption of a state statute unless there is a clear conflict with a federal statute, *Kesler v. Department of Public Safety*, 369 U.S. 153, 172 (1962), and will attempt to reconcile the operation of both statutory schemes with one another, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973).

The court of appeals found preemption because the Minnesota state law at issue "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting Section 10905 (slip op. 5). The court largely was concerned that a state law condemnation action was a "protracted legal proceeding" that would undermine the strict time limit imposed in Section 10905 for purchases or subsidy agreements on lines about to be abandoned (*id.* at 7).

The "delay" inherent in a state law condemnation action does not necessarily harm a railroad because most condemnation statutes provide that the court may order the condemnor to post a bond during the pendency of the action. Therefore, even if a party such as HN has invoked the purchase or subsidy provisions of Section 10905 and then declined to fulfill the terms set by the Commission, at most the railroad will have "lost" 110 days—the statutory time during which any ar-

rangement under Section 10905 for continued rail service is to be completed (see slip op. 6). In a subsequent state law action, a condemnor such as HN will post a bond to compensate the railroad for any damages that the condemnation action should cause. And if a party never invokes Section 10905, but rather only seeks to condemn a rail line for continued rail use, then the railroad never suffers any uncompensated delay.

When Congress amended Section 10905 in the Staggers Rail Act of 1980, it shortened from six months to 110 days the period during which a potential purchaser or subsidizer negotiates with the railroad that is abandoning the line. Compare 49 U.S.C. (Supp. II) 10905(b) with 49 U.S.C. (Supp. IV) 10905(c)-(f). Congress indicated that the amendment "protect[ed] carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process." H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 125 (1980).

The court of appeals interpreted the remarks of the Committee on Conference on the Staggers Act to means that carriers should be protected from a condemnation action after abandonment has occurred. I believe, however, that Congress referred to the six month proceedings under former Section 10905, during which the abandonment of a rail line was held in abeyance while an offeror and the railroad negotiated a subsidy or purchase price. Those proceedings delayed the abandonment. By contrast, the state law condemnation action at issue did not extend abandonment, which already had occurred when Hayfield filed the action.

Although I support generally the contention of counsel for HN that the court of appeals finding of preemption was not mandated, I do not agree with all of his analysis. In his letter to the Solicitor General (attached), counsel for HN states that

the decision of the Eighth Circuit finding preemption conflicts with *Chicago & North Western Transportation Co. v. United States*, 678 F.2d 665, 667 (7th Cir. 1982), in which the Seventh Circuit stated that a potential offeror under former Section 10905 "could . . . wait till the line was abandoned and then reacquire it [by eminent domain] at its nonrail value—or even condemn it before abandonment. . . ." I do not agree that there is a conflict. I agree with the court of appeals (slip op. 11) that the Seventh Circuit's language was dictum and does not show that the Seventh Circuit believes the opposite of the Eighth Circuit, *i.e.*, that state condemnation laws are consistent with the purpose of Section 10905. Moreover, the Seventh Circuit did not discuss the issue of federal preemption.

Similarly, there is no direct conflict between this decision and *Patrick W. Simmons v. ICC*, No. 81-2009 (D.C. Cir. December 14, 1982) (attached). In *Simmons*, the D.C. Circuit cited with approval (slip op. 10) the Commission's statement that it lacks jurisdiction to regulate a state's acquisition of an already abandoned rail line. That statement does not indicate any view of whether the the Commission's plenary jurisdiction over abandonments extends also to "provid[ing] for continuation of rail service in connection with abandonment," as the court of appeals found in this case (slip op. 7).

I do find a conflict in the philosophies of the *Simmons* decision and the court of appeals decision in this case, however, because the *Simmons* court recognized the willingness of state governments to "to undertake programs to retain local rail service" and that funding for such programs typically is "short term" (slip op. at 22). In this case, the court of appeals failed to consider an important state function when it found that a federal statute preempted one of the means by which

a state can help to retain local rail service after short-term funding is exhausted.

I also find a conflict between the court of appeals decision and the interest of the federal government (largely that of DOT) in encouraging states and their subdivisions to continue rail service that is not required in interstate commerce. In 1973, Congress enacted a federal entitlement program that allowed states and their subdivisions to continue rail service and provided loans for state acquisition and modernization of rail properties. Sections 401-403, Regional Railroad Reorganization Act of 1973, Pub. L. 93-236, 87 Stat. 985, 1010-1012. In 1976, Congress repealed those provisions and replaced them with a comprehensive local rail service assistance program including both entitlement funds and financial assistance. Sections 803, 805, 806, Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31, 130-133, 139-143. See also, *Chicago & North Western, supra*, 678 F.2d 665. As the funds for such entitlement programs diminish in an era of fiscal restraint, the states will depend more on condemnation as a means to continue rail service.

Sincerely yours,

JOHN BROADLEY

General Counsel

APPENDIX R

GOVERNMENTAL AFFAIRS
OFFICE OF THE CHAIRMAN
TO: Distribution List
FROM: Bruce Hatton
DATE: February 25, 1983
SUBJECT: Hayfield Northern R.R. Company

Recently, you wrote to us about the subject railroad, asking that the ICC support the State of Minnesota's position. Enclosed, for information, is a copy of a letter which our General Counsel has sent to the Solicitor General in regard to this case. This letter has been approved by the Commission.

Ref: Your letter of December 17, 1982 & February 3, 1983.

Distribution List:

Honorable Russell Long
Honorable Rudy Boschwitz
Honorable Dave Durenberger
Honorable Bill Frenzel
Honorable Martin O. Sabo
Mr. Warren B. Dunham

APPENDIX S

Art. 8 § 10. Internal improvements

Section 10. The state shall never contract any debt for works of internal improvement, or be a party in carrying on such works; but whenever grants of land or other property shall have been made to the state, especially dedicated by the grant to particular works of internal improvement, the state may carry on such particular works and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such works in aid of their completion. Provided, that the state may appropriate money in the treasury or to be thereafter raised by taxation for the construction or improvement of public highways or the development, improvement and construction of airports or other aeronautical projects or the acquisition, improvement or construction of veterans' housing or the improvement of port facilities. Provided, that the state may appropriate moneys for the purpose of acquiring, preserving and developing the forests of the state; but of the moneys appropriated under the authority of this section in any one year an amount not to exceed two-tenths of one mill of the taxable property of the state as determined by the last preceding state assessment may be raised by a tax on property.

(As amended April 1960; April 2, 1968).

APPENDIX T

85.09 Acquisition of abandoned property

(1) Definitions. As used in this section:

(a) "Railroad" has the meaning designated under s. 195.02 (1).

(b) "Railway" means a corporation described in s. 193.01.

(c) "State agency" means state departments and independent agencies.

(d) "System diagram map" means the map required under federal law to be filed with the department by the railroad operating in this state that indicates rail lines in the process of abandonment, rail lines the railroad expects to abandon and the rail lines that are under study by the railroad for possible abandonment in the future.

(2) First right of acquisition. The department shall have the first right to acquire, for present or future transportational, recreational or scenic purposes, any property used in operating a railroad or railway including * * * *land* and rails, ties, switches, trestles, bridges and the like located thereon, which has been abandoned. Acquisition may be by gift, purchase or condemnation in accordance with the procedure under s. 32.05. No person owning such abandoned property, including any person to whom ownership reverts upon abandonment, may convey or dispose of any abandoned property without first obtaining a written statement from the department indicating that it does not intend to exercise its right to acquire the property. No railroad or railway may convey any such property prior to abandonment if that property is part of a rail line shown on the railroad's system map as in the process of abandonment, expected to be abandoned or under study for possible abandonment unless the conveyance or disposal is for

the purpose of providing continued rail service under another company or agency. Any conveyance made without obtaining such release is void. The department's first right of acquisition under this subsection does not apply to any railroad property declared by the department to be abandoned before January 1, 1977. The department may acquire any abandoned property under this section regardless of the date of its abandonment.

(3) Determination of abandonment. For purposes of this section, railroad or railway property shall be deemed abandoned if *one of the following paragraphs applies*:

(a) A certificate or approval of abandonment has been issued by the interstate commerce commission or any other federal or state agency having jurisdiction over the abandonment of * * * *the* property and operations have been terminated in accordance with the certificate or approval * * *.

(b) * * * *A* certificate or approval of abandonment is not required and the use of * * * *the* property for railroad or railway purposes has been discontinued with the intent not to resume. Intent not to resume may be inferred from circumstances including, but not limited to, the following:

1. If the property is not used for railroad purposes for 2 consecutive years.

2. If the facilities on the property are removed or rendered unfit for service.

3. If the property is used for other than railroad purposes.

(c) A federal bankruptcy court or trustee declares the property to be excess to a reorganizable rail system and offers it for sale.

(4) Acquisition and conveyance. Upon its own initiative, the department may determine at any time whether the property of the railroad * * * is abandoned, and whether it is in

the best interest of the state to acquire such property. Within 90 days after being requested by any state agency, any railroad * * * or any county or municipality in which the property is located, the department shall, *subject to sub. (5)(b)*, make a determination of the abandonment status and, if found to be abandoned, shall determine whether it is in the best interest of the public to acquire the property. If it is determined to acquire the property or any part or interest therein, the department shall, within 180 days of the determination of its abandoned status, or the interstate commerce commission's final order permitting the abandonment, or the termination of any efforts to negotiate an agreement for continual operation of rail service on the line, whichever occurs last, determine the fair market value of the property and acquire the property at a price deemed reasonable by the department or make a relocation order under s. 32.05. In making its determination, the department shall consider long-range potential for use of such property for restoration of railroad service and for * * * *other transportation related purposes.* The department shall solicit the opinions of appropriate state agencies, affected counties and municipalities and other interested persons. The department shall give due consideration to an expressed desire by a state agency or an affected county or municipality to acquire, in whole or in part, the property under consideration. * * * *Subject to sub. (6), all* or part of any interest in abandoned property acquired by the department under this section or under s. 66.941(7), 1975 stats., may be subsequently conveyed to another state agency or a county or municipality for transportational, recreational or scenic purposes, *or to a railroad for continued railroad transportation operations when the railroad has operated on the property for 5 years* and the department may make such conveyances for such purposes.

Any determination of the department under this section that property is not abandoned shall not preclude the undertaking of a subsequent investigation and determination concerning the same property or any portion thereof. If at any time subsequent to the acquisition of property under this section the department determines that the property is not suitable for transportational, recreational or scenic purposes, or that the property or any interest therein may be conveyed to any other person on terms which are not inconsistent with the potential use of the property for transportational, recreational or scenic purposes or which yield a benefit, including financial benefits, to the state which outweighs the benefit derived from the property if used for transportational, recreational or scenic purposes, the department may convey the property or such interest therein, *subject to sub. (6)*. The department shall give notice of its intention to make the conveyance, and state and local units of government shall have the first 6 months in which to exercise their opportunity to acquire the property or interest therein. The railroad * * * from which the property was acquired shall have the next 6 months in which to exercise * * * *its* opportunity to * * * *reacquire* the property or interest therein. * * *.

(5) Duties of railroads and others. (a) Any railroad which places a rail line or portion of a line on a system diagram map shall within 60 days of such action provide to the department one legible copy of each map in the railroad's possession which shows property boundaries or engineering stations for the line involved. At the same time the railroad shall provide to the department all other pertinent information in its possession requested by the department relating to the title to the property covered by the line involved. The department shall determine the reasonable cost to the railroad of provid-

ing documents and information under this paragraph and shall reimburse the railroad in this amount. Any conveyance by the railroad made without providing the information required by this paragraph is void.

(b) Any state agency, railroad, county or municipality which requests the department to make a determination of abandonment status and public interest in acquisition of property under sub. (4) shall provide a formal legal description of the property which is the subject of the request. The department may decline to take action on requests which do not contain an adequate description of the property involved. When the department provides a release of its first right to acquire property, the state agency, railroad, county or municipality which receives the release shall within 90 days have the release recorded by the register of deeds for each county in which the property is located.

(6) State rights subordinate to federal law. To the extent that the first or subsequent rights of acquisition under this section conflict with rights conferred by 49 USC 10905(f)(4) or 10910(h), the rights conferred by this section are subordinate to such federal rights and shall take effect only when consistent with 49 USC 10905(f)(4) and 10910(h).

(7) Rules. The department may adopt such rules as it deems necessary to accomplish the purposes of this section.

[Wis. Stat. Ann. (West 1982)]

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No. 82-1579

IN THE

Supreme Court of the United States

October Term, 1982

HAYFIELD NORTHERN RAILROAD COMPANY, INC.,
Appellant,

and

STATE OF MINNESOTA,
Appellant/Intervenor,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT SUPPLEMENTAL MEMORANDUM OF APPELLANT AND APPELLANT-INTERVENOR AND APPENDIX

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IN THE

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Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT SUPPLEMENTAL MEMORANDUM OF APPELLANT AND APPELLANT-INTERVENOR AND APPENDIX

INTRODUCTION

Appellant and appellant-intervenor are filing this supplemental memorandum to apprise the Court of the recent decision of the Interstate Commerce Commission (ICC) entitled *Chicago and North Western Transp. Co.—Abandonment in Waukesha, Jefferson and Dane Counties, Wisconsin*, Docket No. AB-1, (Sub-No. 144) (Decided May 5, 1983, Served May 13, 1983). This decision, set forth in the supplemental appendix to this memorandum (Supp. App. A-1), directly conflicts with the decision of the Eighth Circuit in this case and contradicts the Eighth Circuit's surmise of the ICC official position on the question raised in this appeal: Whether state power of eminent domain may be exercised on abandoned property that once was a rail line regulated by the federal government.

I. THE POSITION OF THE HAYFIELD NORTHERN AND THE STATE OF MINNESOTA IS CONSISTENT WITH THE INTERSTATE COMMERCE COMMISSION'S AUTHORITATIVE CONSTRUCTION OF THE INTERSTATE COMMERCE ACT.

A. The Court Should Defer to the Agency's Interpretation of Its Own Statute.

It is well established that in questions of statutory construction, the interpretation of the agency charged with administration of the statute is entitled to great deference. *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 381 (1969). See also *Miller v. Youakim*, 440 U.S. 125, 145, fn. 25 (1979).

Such deference is particularly necessary where, as here, the agency is taking the first step toward implementing a new approach to regulatory reform mandated by Congress, *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Atchison, Topeka & Santa Fe Railway v. ICC*, 580 F.2d 623, 629 (D.C. Cir. 1978), and when agency interpretation "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933) (per Justice Cardozo). Accordingly, courts should await agency determination before deciding matters that lie within the expertise of the agency in order "to prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court of the scope and meaning of the statute as applied to those particular circumstances." *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 498-499 (1958); see also *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

The Eighth Circuit recognized in this case that deference was to be accorded to the ICC as the agency entrusted with enforcing the Interstate Commerce Act because it grounded its decision below in part on what it believed the ICC position to be. The Commission decision of May 5, 1983, proves, however, that the Court interpretation was erroneous.

B. The Interstate Commerce Commission Has Formally Rejected the Holding of the Circuit Court of Appeals for the Eighth Circuit in this Matter.

In *Chicago and North Western Transp. Co.—Abandonment in Waukesha, Jefferson, and Dane Counties, Wisconsin*, Docket No. AB-1, (Sub-No. 144) (decided May 5, 1983, served May 13, 1983) (Supp. App. A-1), the Commission was asked by the Wisconsin Department of Transportation whether an abandonment of a rail line would have any impact on the State's power of eminent domain as to that rail line in light of *Hayfield Northern R.R. Co., Inc. v. Chicago and North Western Transp. Co.*, 693 F.2d 819 (8th Cir. 1982), the decision below. The Commission, rejecting the Eighth Circuit decision, stated:

> We wish to point out to WisDot that after all conditions to an abandonment have been complied with and the certificate is effective, federal interest and Commission jurisdiction end. (Supp. App. A-5)

This Commission decision is in direct conflict with the decision of the court of appeals below.

CONCLUSION

The May 5, 1983, decision of the ICC makes plenary consideration by this Court even more appropriate than before.

Respectfully submitted,

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May 27, 1983

APPENDIX

INTERSTATE COMMERCE COMMISSION

CERTIFICATE AND DECISION

Docket No. AB-1 (Sub-No. 144)

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—ABANDONMENT—IN WAUKESHA, JEFFERSON AND DANE COUNTIES, WI

Decided: May 5, 1983

Chicago and North Western Transportation Company (C&NW) seeks a certificate of public convenience and necessity permitting the abandonment of 48.2 miles of its railroad line between milepost 20.6 near Waukesha, WI and milepost 71.0 near Cottage Grove, WI. The abandonment would not include the 2.2-mile segment between milepost 47.8 and milepost 50.0 near Jefferson Junction, WI.

Public notice of the abandonment application was served, posted, and published by C&NW in accordance with the notice requirements set forth in 49 U.S.C. §10904(c)(1). Protests were timely filed by Miller Grain Drying and Storage, Inc., Lake Mills Feed & Grain, Inc., Farmers Union Central Exchange, Inc. (CENEX), Gordon Gottschalk, City of Lake Mills, WI, Town of Cottage Grove, Pat N. Burgett, County of Jefferson, Village of Dousman, Farm Better Service, Inc., and Crepaco, Inc., while comments were submitted by Walter F. Zahn, Timberline, Incorporated, and Wisconsin Department of Transportation (WisDot). In addition, the Brotherhood of Railway Carmen of the United States and Canada (BRC) and the Railway Labor Executives' Association (RLEA) request certain labor protective conditions.

The Commission has determined that an investigation into the proposed abandonment should not be instituted. We are

now issuing a decision on the merits of this proposal under 49 U.S.C. §10904(c)(2). For the reasons discussed below, we approved the abandonment.

Applicant's Evidence

C&NW points out that the general physical condition of the line is fair to poor. Although the maximum timetable speed is 30 miles per hour, there are timetable and slow order restrictions of 10 miles per hour for approximately 39 miles. A bridge at MP 50.1 is out of service. C&NW incurred maintenance costs of $116,491 in 1981 and $65,386 in 1982, and it estimates that it would cost $253,230 in 1983 to maintain tracks, bridges, and other facilities to comply with FRA Class I track safety standards.[1]

Revenues on the line decreased from $164,266 in 1981 to $117,941 in 1982 (base year). Avoidable costs decreased at the same time, from $264,448 in 1981 to $171,938 in 1982, allowing C&NW to reduce its losses from $100,182 in 1981 to $53,997 in 1982. Applicant estimates that continued operation of the line would cause it to incur an annual opportunity cost of $327,270, calculated on the basis of 16.7 percent rate of return applied against a net liquidation value of $1,959,698 attributed to the line.

The volume of traffic handled on the line has declined from 207 carloads in 1981 to 130 in 1982.[2] Applicant believes that available traffic on the line is being moved increasingly by carriers of other modes, or has ceased to move entirely. C&NW

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[1] It would not be necessary to restore the out of service bridge, located on a 5.5-mile section of the line no longer in use. The cost of restoration, estimated at over $400,000, is not included.

[2] These figures do not include the bridge traffic handled on the line. The Commission authorized a waiver of the regulations requiring revenue and cost data related to this traffic because it found the traffic would be rerouted and thus retained after abandonment. See decision served November 24, 1982.

indicates alternative transportation is available. Rail service will continue near shippers at each station on the line. Numerous motor carriers also serve the area.

Protests and Comments

Five shippers or shipper organizations oppose the relief sought. CENEX of London, WI, blends and sells fertilizer to local cooperatives. In 1982, CENEX received 37 carloads of dry fertilizer. It fears that after the abandonment, most of the fertilizer will have to be trucked from Minnesota points, at an increased cost of $48,824 based on its 1982 traffic. Farm Better Service and Miller Grain, both of Dousman, WI and Lake Mills Feed of Lake Mills, indicate competitive disadvantages resulting from higher transportation costs. CREPACO, of Lake Mills, manufactures chemical tanks, some of which weigh 25 tons, measure 15 feet by 75 feet, and cannot be shipped by another mode. CREPACO requests, if the abandonment is authorized, that we require C&NW to help CREPACO locate a siding within reasonable distance for loading tanks on rail cars, and delay the actual date of abandonment 6 months to allow time for CREPACO to locate and purchase property and relocate and install handling facilities needed for loading the tanks.

Five representatives of four local governments also protest the application. The Town of Cottage Grove witness urges that the line between Waukesha and Cottage Grove be repaired, not abandoned. The President of the Board of the Village of Dousman believes discontinuation of service would have a negative effect on the community. Specifically, if Farm Better Service and Miller Grain ceased operations in the Village, approximately $5,600 in annual taxes would be lost. Light industrial development, which is made attractive by rail service and is provided for in the Village Master Plan

adopted in 1979, would be foreclosed by the abandonment. The witness for County of Jefferson testified that its Board of Supervisors adopted a resolution opposing the abandonment and that increased transportation costs will be a disincentive for new and expanding industry. The Jefferson County Board Supervisor who represents the township of Lake Mills, believes C&NW's application is based upon non-representative years when the economy was poor and should instead have included data from previous years. He also points out that no financial assistance has been requested from state or local governments and generally indicates adverse impacts upon industrial development. The City of Lake Mills filed a Resolution Opposing Railroad Abandonment, indicating that local efforts to market industrial land and promote industrial growth would suffer from the abandonment. Lake Mills also objects to the fact that C&NW has been permitted to exclude from its application "its most profitable business," presumably referring to the bridge traffic waiver authorized by the Commission.

Commentators Timber Lane and Walter Zahn us to determine that the corridor is suitable for public use. WisDot als believes that the properties may be suitable for public use.

WisDot notes that a limited number of Lake Mills rail users have indicated rail dependency and that a state rail assistance loan was rejected by the City of Lake Mills. WisDot's analysis of the proposed abandonment lends support to C&NW's application; it indicates that eliminating bridge traffic revenue clearly leaves insufficient originating and terminating traffic and revenues to offset continuing costs of operation. The principal concern of WisDot, however, is whether the proposed abandonment might have an adverse impact upon the State's

sovereign power of eminent domain, citing a recent decision, *Hayfield and Northern Railroad* v. *Chicago and North Western Transportation Company*, 693 F.2d 819 (8th Cir. 1982). WisDot requests us to find: that if the abandonment is authorized, the issuance of a certificate to the applicant completes all federal rail regulatory interest in the matter; and that all provisions of 49 U.S.C. §10905 have been followed and that the Commission's jurisdiction has ended and does not conflict in any way with subsequent acquisition of the property under State eminent domain authority.

We wish to point out to WisDot that after all conditions to an abandonment have been complied with and the certificate is *effective*, federal interest and Commission jurisdiction end. Mere authorization by issuance of a certificate will not foreclose Commission action if, for example, all conditions are not later complied with. No further consideration will be given to this portion at WisDot's request.

Conclusions

In determining whether an application for abandonment should be authorized, we must weigh the burden which continued operations impose upon the railroad and interstate commerce against the burdens which loss of that service will impose upon shippers and community interests.

Applicant's evidence shows that the financial burden on C&NW in continuing to operate the line would grow substantially. C&NW has incurred operating losses on the line in recent years, and those losses will only increase, if service is maintained and the line is kept in a safe operating condition. Although some of the current rail shippers may incur additional costs, if forced to move their products by truck, this situation is not atypical of most abandonments. Inconvenience or increased costs to shippers, standing alone, does not warrant

continuation or a losing operation. *Illinois Central Gulf R. Co.—Abandon.*, 363 I.C.C. 729, 736 (1980). There is only one shipper, CREPACO, that appears to be dependent upon rail service, for the movement of some of its larger, heavier products. CREPACO has not shown by competent evidence, however, that it would be unable to ship its products profitably anyway, or would otherwise be damaged as a result of the abandonment. Furthermore, its request for 6 months additional time to establish new facilities a reasonable distance from rail service shows it has an ability to change operations according to need and possesses some flexibility in short-haul transportation alternatives. It has not presented evidence or justification to delay the abandonment for 6 months, or any other specific period of time. Indeed, since C&NW announced its intention to abandon this line over 5 months ago, CREPACO has had time to make changes in its operations that it believes are necessary.

Moreover, we find no evidence that abandonment will have a substantial adverse impact on rural and community development. The arguments made by the local governments are too speculative when compared with the historical evidence submitted by C&NW.

Three specific arguments need to be addressed. First, the Jefferson County Board Supervisor questions the representativeness of the historical data in the record. He suggests that the line was more profitable in past years. C&NW complied with our regulations which require evidence of the most recent years. The burden shifts to protestants to prove why operations many years ago are more representative of the present and future use of the line than the most recent two years. The Jefferson County Board Supervisor has not met that burden.

The same Jefferson County witness also notes that C&NW

has not requested any financial assistance. We note that in the proper exercise of its management discretion, C&NW was entitled to decide whether it was cost efficient to seek assistance in order to continue operating what is clearly an unprofitable line.

Finally, it is inappropriate for the City of Lake Mills to now question the Commission's waiver of bridge traffic data. The Commission found based on C&NW's representations that this traffic would be retained. Accordingly, it would be inappropriate to consider the effects of that traffic when judging the viability of this line segment.

In light of applicant's evidence, supported by WisDot's conclusion that originating and terminating revenues are insufficient to offset continuing costs of operation, we believe that the burden which continued operation of the line imposes on C&NW and upon interstate commerce outweighs the burdens which the shippers and the community may experience from a loss of the rail service. Authority will be granted for C&NW to abandon the line.

Environmental Issues

The environmental and energy impacts of this action have been examined and found not to be significant. Areas of consideration included, but were not limited to, energy consumption, air and water quality, noise levels, and public safety. It was determined that the right-of-way would be suitable for alternative public use following abandonment. Further, as noted above, certain parties herein have expressed an interest in the properties for public use purposes. Therefore, a public use condition will be imposed.

Labor Protection

In approving this abandonment we must ensure that affected rail employees are adequately protected. 49 U.S.C. §10903(b)(2). The conditions imposed in *Oregon Short Line*

R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979) (*Oregon III*) have been found to satisfy the statutory requirements. The abandonment therefore will be authorized subject to the *Oregon III* conditions.

We find:

1. Abandonment of this line will not result in a serious adverse impact on the rural and community development of Waukesha, Jefferson, and Dane Counties, WI.

2. The property is suitable for other public purposes.

3. This action will not significantly affect either the quality of the human environment or conservation of energy resources.

The present and future public convenience and necessity permit the abandonment by the Chicago and North Western Transportation Company of the above-described line of railroad, subject to the conditions for the protection of employees discussed in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979) and subject to the further condition that C&NW shall keep intact all of the right-of-way underlying the track, including all bridges and culverts, for a period of 120 days from the date of this certificate and decision to permit any State or local government agency or other interested party to negotiate the acquisition for public use for all or any portion of the right-of-way.

It is ordered:

1. Our findings will be published in the *Federal Register* concurrently with the service of this decision. If any person or governmental entity is considering an offer of financial assistance or an offer to purchase the line to allow rail service to be continued, it must tender such offer to the carrier within 10 days following publication. The offer must be filed concurrently with the Commission and the offeror must also comply with 49 CFR §1152.27(b) and 49 U.S.C. §10905.

2. All correspondence to the Commission containing offers of financial assistance for the continued operation or acquisition of this line shall contain an appropriate reference to this proceeding, and the following notation shall be typed in boldface on the lower left-hand corner of envelopes containing such correspondence: "Rail Section AB-RSCP."

3. Subject to the conditions set forth above and provided no offer for continued rail operation is received, an appropriate certificate of abandonment shall be issued. Applicant shall not effect abandonment prior to the effective date of the certificate.

4. If abandonment is effected, tariffs applicable to this line may be canceled upon not less than 10 days notice to this Commission. When filing schedules canceling tariffs applicable to the line, applicant shall refer to this certificate and decision by date and docket number.

5. If the authority granted by this decision is exercised, applicant shall advise this Commission in writing, immediately after abandonment of the line of railroad, of the date on which the abandonment actually took place.

6. If the authority granted in this certificate and decision is not exercised within 1 year from its effective date, it shall be of no further effect.

7. This certificate shall be effective 30 days from the date of the service unless otherwise ordered by the Commission.

By the Commission, Review Board Number 3, Members Krock, Joyce, and Dowell.

Agatha L. Mergenovich
Secretary

(SEAL)

Office - Supreme Court, U.S.
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No. 82-1579

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PROBABLE JURISDICTION NOTED OCTOBER 3, 1983

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JOINT APPENDIX

STATE OF MINNESOTA
County of Dodge

DISTRICT COURT
Third Judicial District

HAYFIELD NORTHERN RAILROAD COMPANY,
A Minnesota Corporation,

Plaintiff,

vs.

CHICAGO, NORTHWESTERN AND
PACIFIC RAILROAD COMPANY,

Defendant.

SUMMONS

THE STATE OF MINNESOTA TO
THE ABOVE NAMED DEFENDANT:

You are hereby summoned and required to serve upon Plaintiff's attorney an Answer to the Complaint which is herewith served upon you within twenty (20) days after service of the Summons upon you, exclusive of the day of service. If you fail to do so, Judgment by Default will be taken against you for the relief demanded in the Complaint.

Dated this 31st day of March, 1982.

WARD, GRAY & OEHLER,
LTD.
By: ROBERT S. ABDALIAN
Attorneys for Plaintiff
103 Omni Building
1652 Greenview Drive S.W.
P.O. Box 6390
Rochester, MN 55903
(507) 288-5567

STATE OF MINNESOTA
County of Dodge

DISTRICT COURT
Third Judicial District

HAYFIELD NORTHERN RAILROAD COMPANY,
A Minnesota Corporation,

Plaintiff,

vs.

CHICAGO, NORTHWESTERN AND
PACIFIC RAILROAD COMPANY,

Defendant.

COMPLAINT

1. Plaintiff Hayfield Northern Railroad Company is a Minnesota Corporation.

2. Defendant Chicago, Northwestern and Pacific Railroad Company is a foreign Corporation.

3. Plaintiff desires to exercise its power of eminent domain pursuant to Minnesota Statute §222.27 and Minnesota Statute §300.04; to wit: Purchase the railroad track and appurtenances and right-of-way of Defendant in Dodge and Mower County, Minnesota from Sargeant and Waltham, Minnesota through Hayfield, Minnesota to Dodge Center, Minnesota.

4. On information and belief Plaintiff believes that Defendant is about to rip out its track in Dodge County, Minnesota or sell its track and appurtenances thereby frustrating and defeating Plaintiff in its attempt to exercise its power of eminent domain.

WHEREFORE, Plaintiff prays:

1. That the Court conduct an expedited hearing or hearings relative to the issues presented in this Complaint as soon as practicable.

2. That, upon such expedited hearings, the Court issue a temporary and permanent injunction as requested in said Complaint.

3. For such other relief as justice and equity may require.

Dated: March 31, 1982.

WARD, GRAY & OEHLER,
LTD.
By: ROBERT S. ABDALIAN
Attorney for Plaintiffs
103 Omni Building
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P.O. Box 6390
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STATE OF MINNESOTA
County of Dodge

DISTRICT COURT
Third Judicial District

HAYFIELD NORTHERN RAILROAD COMPANY,
A Minnesota Corporation,

Plaintiff,

vs.

CHICAGO, NORTHWESTERN AND PACIFIC RAILROAD COMPANY,

Defendant.

TEMPORARY RESTRAINING ORDER WITHOUT NOTICE AND ORDER TO SHOW CAUSE WHY PRELIMINARY INJUNCTION SHOULD NOT ISSUE, MRCP 65

Upon the Complaint filed herewith, Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction,

the Affidavit of Stephen L. Becvar, sworn to on March 31, 1982, in support of such Motion, and the Memorandum of Law in support thereof, and it appearing therefrom that Defendant unless restrained will forthwith sell, encumber, or remove, railroad track and appurtenances located in Dodge County and Mower County Minnesota and that immediate and irreparable injury will be done to Plaintiff in such that acts would alter the status quo existing between Plaintiff and Defendant before a hearing on the merits could be held, and that notice of the application for this order was not given to Defendants to prevent them from accomplishing what is sought to be enjoined before this order could be obtained, therefore, IT IS HEREBY ORDERED that Defendant, its agents, successors, assignees, principals, assignors and persons acting in concert with them are temporarily enjoined pursuant to Rule 65 of the Minnesota Rules of Civil Procedure from encumbering, removing, disposing, or otherwise affecting property owned by Defendant in Dodge and Mower County, Minnesota to wit: approximately 22.0 miles of railroad track and appurtenances running from Sargeant and Waltham through Hayfield, Minnesota to Dodge Center, Minnesota.

IT IS FURTHER ORDERED that Defendants appear and show cause at the hearing to be held at Mantorville, Minnesota, on May 13, 1982 at 2 o'clock p.m., or as soon thereafter as counsel may be heard, why an order should not be made enjoining, during the pendency of this action, Defendant, their agents, successors, assignees, principal, assignors, and persons acting in concert with them from encumbering or removing said property in Dodge and Mower County, Minnesota to any person other than Plaintiff.

IT IS FURTHER ORDERED that Plaintiffs be required to post bond in the penal sum of $2,000.00.

IT IS FURTHER ORDERED that service shall be made on Defendant post haste.

Done this 31st day of March, 1982.

O. RUSSELL OLSON
Judge of District Court
Third Judicial District
Minnesota

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIRST DIVISION

Civil File No. ———

HAYFIELD NORTHERN RAILROAD COMPANY,
A Minnesota Corporation,

Plaintiff,

vs.

CHICAGO, NORTHWESTERN AND
PACIFIC RAILROAD COMPANY,

Defendant.

NOTICE OF FILING
PETITION FOR REMOVAL

TO: The above-named PLAINTIFF and its attorneys, ROBERT S. ABDALIAN, 103 Omni Building, 1652 Greenview Drive S.W., P.O. Box 6390, Rochester, MN 55903 and PAUL A. SKJERVOLD, Suite 1800, Dain Tower, Minneapolis, MN 55402.

You, and each of you, are hereby notified that on April 5, 1982, a Verified Petition for Removal of the above-entitled

action from the District Court of the State of Minnesota, Third Judicial District, County of Dodge, to the United States District Court for the District of Minnesota, First Division, St. Paul, Minnesota, together with a Bond for Removal (copies of which Petition and Bond are attached hereto), were duly filed in the United States District Court for the District of Minnesota, First Division, St. Paul, Minnesota.

DATED: April 5, 1982.

LINDQUIST & VENNUM
By: THOMAS E. GLENNON
Attorneys for Defendant
4200 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
(612) 371-3211

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIRST DIVISION

Civil File No. ———

HAYFIELD NORTHERN RAILROAD COMPANY,
A Minnesota Corporation,

Plaintiff,

vs.

CHICAGO, NORTHWESTERN AND
PACIFIC RAILROAD COMPANY,

Defendant.

VERIFIED PETITION FOR REMOVAL
OF CIVIL ACTION PURSUANT TO
28 U.S.C. §1441

TO: The Judges of the United States District Courts for the District of Minnesota.

Defendant, Chicago, Northwestern and Pacific Railroad Company, correctly identified as Chicago and North Western Transportation Company, a Delaware corporation, files this petition to remove the foregoing cause from the District Court of the State of Minnesota, Third Judicial District, County of Dodge, to the United States District Court for the District of Minnesota, First Division, St. Paul, Minnesota, and respectfully shows:

1. That service of the Summons and Complaint was purportedly made upon defendant Chicago and North Western Transportation Company on April 2, 1982; that a true and correct copy of the Summons and Complaint is attached hereto as Exhibit 1.

2. That said Summons and Complaint are the initial pleadings setting forth the claims upon which the attempted state court action is based, and which together with Motion for Temporary Restraining Order Without Notice, MRCP 65.01, Temporary Restraining Order Without Notice and Order to Show Cause Why Preliminary Injunction Should Not Issue, MRCP 65 signed by Honorable O. Russell Olson, Affidavit of Stephen L. Becvar, Affidavit of Robert S. Abdalian, Notice of Motion for Preliminary Injunction, Motion for Preliminary Injunction, Memorandum of Law in Support of Motion for Temporary Injunction, and Plaintiff's Bond for TRO and Preliminary Injunction, constitute all of the process, pleadings and orders served upon defendant by plaintiff in the state court action. True and correct copies of the afore-described

process, pleadings and orders are attached hereto as Exhibits 2 through 9. No further proceedings have been held in the Dodge County District Court other than the Court's hearing of plaintiff's motion for temporary restraining order, said hearing resulting in the issuance of said Court's Temporary Restraining Order Without Notice and Order to Show Cause Why Preliminary Injunction Should Not Issue, MRCP 65, a true and correct copy of which is attached hereto as Exhibit 3.

3. That at the time of the commencement of this action, defendant Chicago and North Western Transportation Company was and is a Delaware corporation with its offices and principal place of business in Chicago, Illinois; that defendant Chicago and North Western Transportation Company is not a citizen of the State of Minnesota; and that the amount in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs.

4. That upon information and belief, plaintiff Hayfield Northern Railroad Company is a corporation organized and existing under the laws of the State of Minnesota, with its offices and principal place of business in Dodge County, Minnesota, and is a citizen of the State of Minnesota.

5. That the action is a civil action of which this court has original diversity jurisdiction under 28 U.S.C. §1332, and is one which defendant is entitled to remove to this court pursuant to 28 U.S.C. §1441.

6. That the action necessarily involves a civil action arising under the laws of the United States and principles of federal statutory preemption of which this Court has original jurisdiction under 28 U.S.C. §1331, and is one in which defendant is entitled to remove to this Court pursuant to 28 U.S.C. §1441.

7. Defendant Chicago and North Western Transportation Company files herewith a bond with good and sufficient surety

conditioned that defendant Chicago and North Western Transportation Company pay all costs and disbursements incurred by reason of this removal proceeding should it be determined that the action was not removable or was improperly removed.

WHEREFORE, Defendant Chicago and North Western Transportation Company prays that the above action now pending in the District Court, County of Dodge, State of Minnesota, be removed from that court to this United States District Court.

Dated this 5th day of April, 1982.

LINDQUIST & VENNUM
By THOMAS E. GLENNON
Attorneys for Defendant
4200 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
(612) 371-3211

STATE OF MINNESOTA
COUNTY OF HENNEPIN—ss.

Thomas E. Glennon, being first duly sworn on oath deposes and states that he is the attorney for the defendant Chicago and North Western Transportation Company, herein; that he has read the foregoing Petition for Removal pursuant to 28 U.S.C. §1441 and knows that contents thereof and that the same are true of his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

THOMAS E. GLENNON

(Jurat omitted in printing)

(Affidavit of service omitted in printing)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIRST DIVISION

Civil File No. 3-82-376

HAYFIELD NORTHERN RAILROAD COMPANY,
A Minnesota Corporation,

Plaintiff,

v.

CHICAGO, NORTHWESTERN AND PACIFIC RAILROAD COMPANY,

Defendant.

ANSWER OF CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

Defendant Chicago and North Western Transportation Company ("C&NW"), incorrectly identified as Chicago, Northwestern and Pacific Railroad Company, for its Answer to plaintiff's Complaint, states and alleges as follows:

FIRST DEFENSE

1. C&NW denies each and every allegation, statement, matter and thing contained in plaintiff's Complaint except as hereinafter specifically admitted, qualified and alleged.

2. C&NW is without information sufficient to form a belief as to the truth or accuracy of the allegations contained in Paragraph 1 of plaintiff's Complaint, and therefore denies the same.

3. With respect to the allegations contained in Paragraph 2 of plaintiff's Complaint, C&NW states and alleges that it is a foreign business corporation organized and existing under the laws of the State of Delaware, and is authorized to do

business and is doing business in the State of Minnesota as a railroad corporation which owns and operates an interstate railroad system.

4. With respect to the allegations contained in Paragraph 3 of plaintiff's Complaint, C&NW states and alleges that the principals and incorporators of the plaintiff had invoked the Interstate Commerce Commission's exclusive plenary jurisdiction pertaining to continued rail service, which said jurisdiction resulted in an unappealed order determining fair market value for purposes of acquisition or subsidy of the segment of railroad line in question. The principals and incorporators of plaintiff chose not to exercise the rights pursuant to federal law and did not appeal the Interstate Commerce Commission's determination of fair market value for purposes of acquisition or subsidy required, 49 U.S.C. §10905 (f)(1) and (2), but rather, appealed the substantive issue of abandonment.

5. With respect to the allegations contained in Paragraph 4 of plaintiff's Complaint, C&NW states and alleges that C&NW is prepared to exercise rights and obligations accorded it by the Interstate Commerce Act and proceedings undertaken before the Interstate Commerce Commission, pursuant to the provisions and procedures of the Interstate Commerce Act and regulations promulgated thereunder.

SECOND DEFENSE

6. Plaintiff's Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

7. Plaintiff's purported claim for relief is precluded pursuant to the terms and effect of the Interstate Commerce Act, which by its terms and effect preempts plaintiff's purported state court action, pursuant to the supremacy clause of U. S. Const., Art. VI, cl. 2.

FOURTH DEFENSE

8. Plaintiff's purported cause of action constitutes an impermissible collateral attack on the regulatory processes, powers and orders of the Interstate Commerce Commission, and as such, plaintiff's purported cause of action is barred by operation of the plenary and preemptive powers and procedures of the Interstate Commerce Act and regulations promulgated thereunder.

FIFTH DEFENSE

9. To the extent of any conflict between the terms and effect of the Interstate Commerce Act and Minn. Stat. §§222.27 and 300.04, said Minnesota statutes constitute an impermissible burden on interstate commerce and an impermissible obstruction of the rights and responsibilities accorded C&NW by the processes, powers and orders of the Interstate Commerce Commission and proceedings undertaken before the Interstate Commerce Commission pursuant to the Interstate Commerce Act.

SIXTH DEFENSE

10. Plaintiff's purported claim for relief is barred by operation of the doctrines of estoppel, laches and waiver.

WHEREFORE, defendant Chicago and North Western Transportation Company prays that this Court dismiss plaintiff's pretended cause of action against defendant Chicago and North Western Transportation Company, and award defendant Chicago and North Western Transportation Company its reasonable attorneys' fees, costs and disbursements herein, together with such other and further relief as this Court deems just and appropriate.

DATED: April 16, 1982.

LINDQUIST & VENNUM
By Thomas E. Glennon and
Edward M. Glennon
4200 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
(612) 371-3211
Attorneys for Defendant
Chicago and North Western
Transportation Company

OF COUNSEL:
Stuart F. Gassner
Assistant General Counsel
Chicago and North Western
Transportation Company
One North Western Center
165 North Canal Street
Chicago, Illinois 60606
(312) 559-6072

(Affidavit of service omitted in printing)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIRST DIVISION

File No. 3-82-376

HAYFIELD NORTHERN RAILROAD COMPANY,
a Minnesota corporation,

Plaintiff,

v.

CHICAGO, NORTHWESTERN AND PACIFIC
RAILROAD COMPANY,

Defendant.

NOTICE OF MOTION AND MOTION TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, TO DISSOLVE THE TEMPORARY RESTRAINING ORDER

TO: Plaintiff and its Attorneys, Robert S. Abdalian, Esq. and Ward, Gray & Oehler, Ltd., 103 Omni Building, 1652 Greenview Drive S.W., P.O. Box 6390, Rochester, Minnesota 55903, and Paul A. Skjervold, Esq., Suite 1800, Dain Tower, Minneapolis, Minnesota 55402.

PLEASE TAKE NOTICE that defendant Chicago and North Western Transportation Company will move the Court on the 14th day of May, 1982, at 3:00 p.m., or as soon thereafter as counsel can be heard, in Courtroom 3, Federal Courts Building, St. Paul, Minnesota, before Judge Paul A. Magnuson, for an Order dismissing the Complaint or, in the alternative, dissolving the temporary restraining order herein dated April 2, 1982.

The grounds for said Motion are as follows:

1. Pursuant to Rule 12(b)(1), Fed. R. Civ. P., the Court lacks jurisdiction over the subject matter of plaintiff's Complaint.

2. Pursuant to Rule 12(b)(6), Fed. R. Civ. P., plaintiff's Complaint fails to state a claim upon which relief can be granted.

3. Pursuant to Rule 65, Fed. R. Civ. P., the Court should dissolve the temporary restraining order herein dated April 2, 1982, signed by Honorable O. Russell Olson, as contrary to law.

This Motion will be made upon the attached Memorandum of Law in Support of Chicago and North Western Transportation Company's Motion to Dismiss the Complaint or, in the Alternative, to Dissolve the Temporary Restraining Order, and upon all the files, records, and proceedings herein.

DATED: April 30, 1982.

LINDQUIST & VENNUM
By Thomas E. Glennon
4200 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
(612) 371-3211
Attorneys for Defendant
Chicago and North Western
Transportation Company

OF COUNSEL:
Stuart F. Gassner
Assistant General Counsel
Chicago and North Western
Transportation Company
One North Western Center
165 North Canal Street
Chicago, Illinois 60606
(312) 559-6072

(Affidavit of service omitted in printing)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil File No. 3-82-376

HAYFIELD NORTHERN RAILROAD COMPANY,
a Minnesota corporation,

Plaintiff,

v.

CHICAGO, NORTHWESTERN AND PACIFIC
RAILROAD COMPANY,

Defendant.

ORDER

This matter is before the Court on the motion of the State of Minnesota to intervene. Gilbert S. Buffington, Special Assistant Attorney General, appeared for the State; Paul A. Skjervold, Esq. and Robert S. Abdalian, Esq., appeared for the plaintiff. Thomas E. Glennon, Esq. and Ann Keating, Esq., appeared for the defendant. Based upon the motion of the State, the State's supporting memorandum, the submissions of counsel and the files and proceedings herein,

IT IS ORDERED that the State of Minnesota may intervene in this matter with all the rights of a party.

Dated: June 8, 1982.

PAUL A. MAGNUSON
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIRST DIVISION

File No. 3-82-376

HAYFIELD NORTHERN RAILROAD COMPANY,
a Minnesota corporation,

Plaintiff,

v.

CHICAGO, NORTHWESTERN AND PACIFIC RAILROAD COMPANY,

Defendant.

NOTICE OF APPEAL

Notice is hereby given that Hayfield Northern Railroad Company, plaintiff above named, hereby appeals to the United

States Court of Appeals for the Eighth Circuit from the final judgment entered in this action on the 22 day of July, 1982.
Dated: 23 July 1982

WARD, GRAY & OEHLER, LTD.
By: Robert S. Abdalian
Attorney for Hayfield Northern
Railroad Company
P. O. Box 6390
Rochester, MN 55903
(507) 288-5567

WARREN SPANNAUS
Attorney General
Attorney for Defendant
Intervenor
By: Gilbert S. Buffington
Special Assistant
Attorney General

(Affidavit of service omitted in printing)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1981
No. 82-1880

HAYFIELD NORTHERN RAILROAD,
Appellant,

vs.

CHICAGO NORTHWESTERN TRANSPORTATION COMPANY,
Appellee.

Appeal from the United States District Court for the District of Minnesota

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Before: HEANEY, BRIGHT, ARNOLD, Circuit Judges

ORDER

The motion to expedite the appeal is granted. The Clerk is directed to set this case for oral argument on the appeal at the September session in St. Paul, Minnesota. The Clerk will set an expedited briefing schedule.

The stay pending appeal will continue in effect; provided, however, that appellant must post a bond in the amount of $100,000.00 on or before Monday, August 2, 1982 in form and content satisfactory to the Clerk of this Court. The bond shall be secured by a corporate surety, cash, government securities, or other good and sufficient security, and shall be conditioned so as to protect appellee from any loss or damages it may sustain if the judgment of the District Court is affirmed.

July 28, 1982

INTERSTATE COMMERCE COMMISSION

DECISION

No. AB-1 (Sub-No. 113)F

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—ABANDONMENT BETWEEN OELWEIN, IA AND RANDOLPH, MN

Decided: July 10, 1981

* * *

CNW's engineering witness, Reid, also calculated the avoidable costs of maintaining ways and structures on the Line as

shown in Appendix B, including estimated costs for the subsidy year to maintain tracks, bridges and other facilities to comply with Federal Railroad Administration track safety standards for Class I track, as set forth in line 5(a) in the final column. The latter amount, $741,585 or $5,079 per mile, contrasts sharply with applicant's system average cost for maintenance of ways and structures, $15,231 per mile annually in 1978-79, and with the average annual expenditure on the Line during those years as developed from CNW payroll and material charge-out records, $2,969 per mile. In the latter regard, some of the costs projected for the subsidy year are well above corresponding actual expenditures on the Line. For example, the costs projected for ties, running, $159,280, contrasts with $2,148 expended in 1979 and $625 during the base year, and the projection for rail, running, is $4,935, as compared with $252 in 1979 and $1,112 in the base year. An even sharper contrast is provided by ballast, running, $509 during the base year projected at $19,185, and roadway machines, projected at $75,174 as compared with zero expenditure during the base year. Applicant defines the projected annual maintenance cost, $741,585, as the average annual cost of maintaining the Line in Class I condition over an extended period of time, a 40 to 50 year period. Applicant acknowledges that maintenance expenditures presently and in recent years have been far below projected costs, and reflect CNW's policy of maintaining its lines in a safe condition while keeping its operating losses at a minimum on marginal lines. Under this policy the Line "was allowed to deteriorate from Class II or better to basically FRA Class I (10 m.p.h.)."

* * *

Applicant insists that in operating the Line it has incurred avoidable losses in the amounts previously described, and that,

taking into consideration opportunity costs, its total avoidable losses on the Line were $1,568,506 in 1978, $1,542,880 in 1979, and $854,758 during the first 7 months of 1980, calculated as set forth in Appendix B. In the latter regard, applicant states that it has calculated opportunity costs using methodology approved by the Commission, and it points out that the Commission has recognized that opportunity costs are real economic costs experienced by railroads when they forego more profitable use of their resources, and that such costs can be a significant factor in determining whether a particular line at issue is imposing a burden on interstate commerce. Applicant also points out that maintenance on the Line has been minimal, consistent with safety of operations, in an effort to economize and to allocate its limited funds to more productive lines. Applicant notes that just to maintain the Line in the future at minimal Class I FRA standards will entail annual expenditures of $741,585, and it contends that it would be an improvident use of funds to make such expenditures on a line that cannot pay its own operating costs. As seen, applicant's calculations totally exclude consideration of overhead traffic, consistent with its corporate decision that overhead traffic will no longer be routed over the Line. The routing of overhead traffic, applicant insists, is completely a matter of managerial discretion, and applicant contends that the Commission has long recognized that it is the carrier's prerogative to use its facilities in the most efficient and least costly manner consistent with its public obligations. In today's world of spiraling material, fuel and labor costs, according to applicant, the ability of management to rationalize the CNW system has been a key to the survival of CNW.

* * *

Considering first the burden imposed on the railroad and on commerce by continued operation of the Line, the evidence is convincing that during 1978, 1979, and the first 7 months of 1980, at least, operations on the Line have been far from a financial drain on applicant or a burden on commerce. To the contrary, the Line yielded substantial net revenues. As computed by applicant, overhead revenues on the Line in 1978 exceeded line-haul expenses (based on replacement costs) by more than $2.5 million and by more than $2.8 million if historical costs are used, and applicant concedes that net overhead revenues would be "somewhere in between" those two figures. Applying the average of those net overhead revenues to applicant's cost and revenue data as shown in Appendix B, applicant's avoidable loss from operations in 1978, $326,850, was actually a net revenue of more than $2.4 million. Similarly, in 1979 and the first 7 months of 1980, applicant had net revenues, on this basis, of more than $3 million and $2.1 million, respectively. Making allowance for opportunity costs as computed by applicant does not alter the fact that operations on the Line during these periods yielded net revenues. In the latter regard, opportunity cost has been defined as the economic loss experienced by a carrier when it foregoes some other, more profitable use of its resources, such as a branch line, i.e., an investment, such as is

represented by a branch line, which brings a return to a carrier that is less than the cost of capital represents an opportunity cost. *Texas and Pacific Railway Company Abandonment*, 363 I.C.C. 666 (1980). The Commission in recent years has considered opportunity cost as a factor, one of many, in fact, in its determinations of whether public convenience and necessity permit the abandonment of rail lines in particular cases. See

Texas and Pacific, supra, and the decision of the Seventh Circuit in *Farmland Industries, Inc. v. United States and Interstate Commerce Commission* (No. 80,1308, decided March 3, 1981). In this proceeding, as in others, opportunity costs must be weighed in the balance to determine whether there is undue burden on the carrier and on commerce.

— 19 —

* * *

Base year operations as depicted in Appendix F show positive results, that is, a net revenue return based on actual, historical data. It is the essence of applicant's case, however, that the great volume of overhead revenues reflected in this data must be ignored because applicant, as a matter of managerial discretion, has determined that overhead traffic will no longer move on this Line. There is ample precedent for the proposition advanced by applicant that the routing of overhead traffic and the selection of alternate routes for the handling of such traffic is a matter of managerial discretion. See *Baltimore & Ohio R. Co. Abandonment*, 354 I.C.C. 240 (1978) and *Southern Pacific Transp. Co.—Abandonment*, 360 I.C.C. 138 (1979). Protestants' basic argument in *Baltimore & Ohio, supra*, as here, was that applicant had failed to prove that the line proposed to be abandoned was operating at a loss. The evidence there showed that operating losses would have been incurred if overhead movements were not considered. In approving the abandonment, the Commission noted that it has long recognized that, while revenues derived from overhead traffic are a factor in determining a line's earning capacity, in the final analysis it is the revenues produced by traffic originating and terminating on a line, and the expenses incident to such traffic, that is the principal criteria in determining whether there exists a real need for the continued operation of the line. The Commission

stressed that carriers should be free to use their facilities in such a manner as they deem necessary for the promotion of economy and efficiency, and that local shippers who are unable to support a railroad line cannot demand continued rail transportation simply because the line is used for the movement of overhead traffic, traffic which could be handled as expeditiously over other routes. More recently, in No. AB-7 (Sub-No. 76), *Chicago, Milwaukee St. P. & P. R. Co., Abandonment*, decided December 3, 1979 (not printed), division 2 of the Commission stated that so long as shippers can route overhead traffic over similar routes, the contribution of overhead traffic moving over a line proposed to be abandoned will not be considered. In the instant proceeding, as seen, applicant has shown that it has various, adequate alternatives for routing its overhead traffic now or formerly moving on this Line, and that a management decision has been made to divert from the Line all remaining overhead traffic. Applicant's officials freely acknowledged that this decision was made in contemplation of this abandonment, pointing out that the shifting of overhead traffic away from the Line is a step in the overall rationalization of its entire system for reasons of economy and efficiency. Thus, while on its face, applicant has by corporate decree rendered a profitable line unprofitable, the move is, in a larger sense, in accord with overwhelming Commission precedent.

* * *

DOCKET NUMBER AB-1 (SUB. NO. 113F)

APPENDIX C

OELWEIN, IOWA TO RANDOLPH, MINNESOTA
INCLUDING HAYFIELD TO WALTHAM, MINNESOTA

ESTIMATED LIQUIDATION VALUE

Main Track	144.8 Miles
Other Track	24.8 Miles
Total All Tracks	169.6 Miles

Land

2,107.48 Acres which possibly can be sold to various persons at an estimated total value of $1,742,000						$(1,742,000)

Bridges, Trestles and Culverts

Bridge timber, usable	53.322	MBM	@	$ 365.00	$(19,463)	
Bridge steel, usable	264.2	NT	@	632.20	(167,027)	
Bridge steel, scrap	219.0	NT	@	77.82	(17,043)	
						(203,533)

Ties

Cross ties, usable	222,100	Ea.	@	5.04	(1,119,384)	
Switch ties, usable	143.604	MBM	@	224.38	(32,222)	
						(1,151,606)

Rail

115# Usable	14,887.172	NT	@	312.90	(4,658,196)	
112# Usable	944.029	NT	@	312.90	(295,387)	
100# Usable	480.983	NT	@	312.90	(150,500)	
90# Usable	10,246.020	NT	@	312.90	(3,205,980)	
112# Scrap	9.539	NT	@	79.64	(760)	
100# Scrap	9.817	NT	@	79.64	(782)	
90# Scrap	1,138.455	NT	@	79.64	(90,667)	
85# Scrap	1,331.256	NT	@	79.64	(106,021)	
75# Scrap	838.312	NT	@	79.64	(66,763)	
60# Scrap	82.780	NT	@	79.64	(6,593)	
						(8,581,649)

Other Track Material

Crossing Diamonds, usable		2	Ea.	@ 15,000.00	(30,000)	
Turnouts complete, usable	#12-115#	1	TO	@ 9,216.37	(9,216)	

DOCKET NUMBER AB-1 (SUB. NO. 113F)

Appendix C

OELWEIN, IOWA TO RANDOLPH, MINNESOTA
INCLUDING HAYFIELD TO WALTHAM, MINNESOTA

ESTIMATED LIQUIDATION VALUE—Continued

Other Track Material (continued)						
	#12-90#	1	TO	@ 6,956.69	(6,957)	
	#10-115#	13	TO	@ 7,817.74	(101,631)	
	#10-90#	3	TO	@ 5,899.75	(17,699)	
	#9-90#	1	TO	@ 4,963.53	(4,964)	
	#8-90#	10	TO	@ 4,001.86	(40,019)	
	#8-85#	1	TO	@ 3,797.20	(3,797)	
Switches, frogs, guard rails switch lamps and switch stands						
Scrap	151.660	NT		@ $ 64.18	$(9,734)	
Tie plates (Gross less 10% estimated loss)						
Usable	125,905.18	Cwt.		@ 18.82	(2,369,535)	
Scrap	368.991	NT		@ 91.67	(33,825)	
Joint bars (Gross less 10% estimated loss)						
Usable	19,000.75	Cwt.		@ 26.25	(498,770)	
Scrap	627.519	NT		@ 91.67	(57,525)	
Bolts, nutlocks & spikes, etc. (Gross less 25% estimated loss)						
Scrap	1,129.216	NT		@ 91.67	(103,515)	
						$(3,287,187)
Signals						(115,500)
Communications						
Copper Wire	13,566	lbs.		@ 0.76	(10,310)	
Hot Box Detector	1	Ea.		@ 12,000	(12,000)	
						(22,310)
Buildings						(7,500)
TOTAL ESTIMATED GROSS LIQUIDATION VALUE						$(15,111,285)

DOCKET NUMBER AB-1 (SUB. NO. 113F)

Appendix C

OELWEIN, IOWA TO RANDOLPH, MINNESOTA
INCLUDING HAYFIELD TO WALTHAM, MINNESOTA

ESTIMATED LIQUIDATION VALUE—Continued

Estimated cost of labor and material recovering and dismanteling property	
Bridges	$ 258,000
Track	1,470,400
Restoring street and highway crossings	225,000
Land disposal	3,000
Signals	153,800
Communications	11,300
Buildings	3,900
TOTAL ESTIMATED COST OF LABOR AND MATERIAL RECOVERING PROPERTY	$ 2,125,400
TOTAL ESTIMATED NET LIQUIDATION VALUE	$(12,985,885)

MBM = 1,000 board measure
NT = Net ton of 2,000 pounds
Ea. = Each
TO = Turnout
Cwt. = Hundredweight
Lbs. = Pounds

INTERSTATE COMMERCE COMMISSION
CERTIFICATE AND DECISION
Docket No. AB-1 (Sub-No. 113F)
CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY—
ABANDONMENT BETWEEN OELWEIN, IA AND
RANDOLPH, MN
Decided: October 7, 1981

* * *

Concerning the ongoing subsidy offer, we have been requested to determine its amount and terms based on the avoidable cost of providing continued rail transportation, plus a reasonable return on the value of the line [see 49 U.S.C. §10905(f)(1)]. Our determination will be reached by October 24, 1981. Our decision in this matter will be binding upon the parties unless the sole

offeror in this proceeding withdraws its offer within 10 days. If the offer was to be withdrawn in a timely fashion, we would issue an abandonment certificate for the 19.2 mile segment as expeditiously as practicable. Of course, if our determination is accepted, a certificate would be withheld during the subsidy period.

Modification of Conditions. — CNW has requested that the 120-day public use condition imposed by the ALJ be modified to permit the removal of the track. We will agree to this proposed modification.

The environmental threshold assessment survey (ETAS) prepared by the Commission's Section of Energy and Environment recommended the imposition of a public use condition because the right-of-way would be suitable as a multipurpose trail for snowmobiling, biking, and hiking. Generally speak-

ing, the "public use" provisions of 49 U.S.C. § 10906 deal with the acquisition of rail properties for *other* public purposes; and, therefore, no useful purpose is served by requiring an applicant to keep rails and ties in place during the 120-day negotiating period. Consequently, since potential interest in this right-of-way involves the non-rail use of the property, the condition imposed by the ALJ will be amended to permit the removal of rail and ties. Cf. *Chicago and North Western Transp. Co.—Abandonment*, 354 I.C.C. 735, 740 (1978).

In certain instances, however, prospective purchasers of these properties may intend to acquire them for mass transportation or other public purposes necessitating maintenance of the track (for example, one other such public use would be conversion of the line into a scenic railway). Such a transaction would fall within the public use provisions of section 10906. Upon an affirmative showing that the existing rail line could be used for mass transpc..ation or similar

purposes requiring retention of the track, the public use condition would provide for maintenance of rail and ties. Because the Commission would need this information at the time it makes its determination as to whether a proposed abandonment would be required or permitted by the present or future public convenience and necessity, the information should be submitted to us within the time provided for filing comments and protests to the proceeding. Thus, information about possible mass transportation use of rail properties proposed for abandonment, requiring maintenance of rail and ties on the right-of-way, must be filed with the Commission.

* * *

INTERSTATE COMMERCE COMMISSION
DECISION
Docket No. AB-1 (Sub-No. 113F)
CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY—
ABANDONMENT BETWEEN OELWEIN, IOWA, AND
RANDOLPH, MN
REQUEST TO ESTABLISH CONDITIONS
AND COMPENSATION
Decided: October 16, 1981

* * *

Net Liquidation Value. The amount of the subsidy is based, in part, upon a reasonable return on the value of the line. This is calculated by applying a reasonable rate of return on an investment base comprised of three elements: working capital; income tax benefits; and net liquidation value. There appears to be no dispute on the working

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capital and since CNW does not pay taxes, there are no income tax benefits.

The Shippers Group maintains that the proper net liquidation value of the line segment is $1,527,320. This figure is based on a land value of $195,098 plus net salvage value of track materials of $1,332,222. CNW proposes a figure of $1,791,354 which is based on land value of $252,000 plus net salvage value of track materials of $1,539,354.

Land value — The Shippers Group states that the $195,098 value it placed on the land is based on $827 per acre and a total acreage of 235.91. CNW's land value of $252,000 is based on an average of $1,142 per acre on the 185.52 acres for the line between Dodge Center and Sargeant, and an average of $794 per acre on the 50.39 acres between Hayfield and

Waltham. The offeror argues that CNW's figure is based upon the highest and best use *for rail purposes*. CNW disputes this claim.

It appears that CNW followed the methodology provided in the regulations. It supplied data based upon the testimony of an expert witness. Since CNW took into account factors which could affect valuation, such as questionable titles, and made adjustments for size, shape, location and time necessary to effectuate sales of the property, we will accept its estimate. In contrast, offeror neither provided expert testimony nor data on comparable sales in the area.

Salvageable track material — CNW asserts that the value of the entire 22.9 mile line to be purchased (19.2 miles of main line and 3.7 miles of "other track") is $1,539,354. The Shippers Group makes two adjustments to this figure.

First, the Shippers Group asserts that the value for the entire 22.9 miles is only $1,510,291. However, the $29,063 difference between these estimates is not explained. Since the burden of proof is on the offeror, we will accept CNW's statement that the entire line is worth $1,539,354.

Second, the Shippers Group argues that a substantial portion of the 3.7 miles of "other track" is either not owned by CNW or is not required for subsidy operations. It thus subtracted the pro rated value of 2.7 miles from its original $1,510,291 estimate. CNW states, however, that of the 3.7 miles of "other track", 0.42 mile of private siding was not included and the remaining 3.37 miles is necessary

because it includes 1.05 miles of industrial sidings at Hayfield and 2.23 miles of side track through Hayfield which are used for providing service to shippers at Hayfield and Waltham, who are among the offerors.

We accept CNW's calculations because CNW has already excluded the private sidings from its calculations and has stated that the side track is necessary to serv ce some of the offerors. In conclusion, we find the net salvage value to be $1,539,354.

* * *

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* * *

Docket No. AB-1 (Sub-No. 113F)

CONCLUSIONS

Pursuant to our power to set conditions in subsidy agreements, we will require the offeror to notify both CNW and the Commission of its decision to accept the terms of this decision or withdraw its offer. This written notification must be submitted to CNW and the Commission within 10 days of the service date of this decision.

This decision will not significantly affect either energy consumption or the quality of the human environment.

It is ordered:

1. The Shippers Group must either withdraw its offer or accept the terms of this subsidy agreement within 10 days of service date of this decision. The notification of acceptance or withdrawal shall be made in writing to the Commission, CNW, and all the parties of record.

2. If the Shippers Group files a timely acceptance of the terms of the subsidy agreement it and CNW shall be bound by the terms and conditions established in this decision.

3. If the Shippers Group does not make a timely written acceptance or with drawal of its offer, the Commission shall treat the offer as if it were withdrawn.

4. If the Shippers Group withdraws its offer, the Commission shall issue a certificate authorizing the abandonment.

The abandonment certificate shall be served within 20 days after the service date of this decision.

5. This decision shall be effective on the date it is served.

By the Commission, Chairman Taylor, Vice Chairman Clapp, Commissioners Gresham and Gilliam.

AGATHA L MERGENOVICH
Secretary

(SEAL)

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INTERSTATE COMMERCE COMMISSION
CERTIFICATE AND DECISION
Docket No. AB-1 (Sub-No. 113)
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—ABANDONMENT—BETWEEN OELWEIN, IA AND RANDOLPH, MN
Decided: November 13, 1981

* * *

It is certified that the present and future public convenience and necessity permit the abandonment by the Chicago and North Western Transportation Company of the above-described line, subject to the provisions for the protection of employees discussed in *Oregon Short Line R. Co.—Abandonment Goshen*, 360 I.C.C. 91 (1979), and subject to the further condition that C&NW shall keep intact all of the right-of-way, track, bridges, and drainage culverts on the line for a period of 120 days from August 14, 1981, to permit any State or local governmental agency or other interested persons to negotiate the acquisition for public use of all or any portion of the line.

* * *

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INTERSTATE COMMERCE COMMISSION
Docket No. AB-1 (Sub-No. 113F)
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—ABANDONMENT—BETWEEN OELWEIN, IA AND RANDOLPH, MN
Decided: December 14, 1981

* * *

I also reject petitioners' contention that grant of the stay will not harm CNW. As noted above, CNW is operating a marginal line and is incurring a substantial opportunity cost and a grant of this stay would cause applicant to continue to incur this cost.

* * *

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-2333

BROWNSDALE COOPERATIVE ASSOCIATION; CENTURY PLASTICS, INC.; FARMERS COOPERATIVE OIL ASSOCIATION; HAYFIELD DEVELOPMENT CORPORATION; HAYFIELD LUMBER COMPANY; HUNTTING ELEVATOR COMPANY, INC.; MIDLAND COOPERATIVES, INC.; MOWER COUNTY SERVICE COMPANY; NELSON'S GAS, INC.; POWER SPAN, INC.; REESE FARM CENTER, INC.; AND SARGEANT GRAIN COMPANY,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION

Dated: December 16, 1981

Before LAY, Chief Judge, HENLEY and ARNOLD, Circuit Judges.

ORDER

On motion for leave to intervene by the Chicago and Northwestern Transportation Company and on application of petitioners for stay pending appeal of respondent's order permitting abandonment of rail service on that certain segment of railroad owned by Chicago and Northwestern Transportation Company, 19.2 miles in length located between Dodge Center and Sargeant, Minnesota and between Hayfield and Walthorn, Minnesota,

IT IS ORDERED that the motion for leave to intervene is granted; and

IT IS ORDERED that the petition is denied, but IT IS FURTHER ORDERED that pending further order of court the Chicago and Northwestern Transportation Company shall keep intact all of the right-of-way, track, bridges, and culverts on said line.

The Clerk of court shall fix a briefing schedule which will permit submission of subject case on the merits at its January, 1982, Session of Court in St. Louis.

A true copy.

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit.

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1981

No. 81-2333

BROWNSDALE COOPERATIVE ASSOCIATION; CENTURY PLASTICS, INC.; FARMERS COOPERATIVE OIL ASSOCIATION; HAYFIELD DEVELOPMENT CORPORATION; HAYFIELD LUMBER COMPANY; HUNTTING ELEVATOR COMPANY, INC.; MIDLAND COOPERATIVES, INC.; MOWER COUNTY SERVICE COMPANY; NELSON'S GAS, INC.; POWER SPAN, INC.; REESE FARM CENTER, INC.; AND SARGEANT GRAIN COMPANY,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,

Respondents,

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Intervenors/Respondents.

PETITION FOR REVIEW
OF ORDER OF INTERSTATE
COMMERCE COMMISSION

On consideration of petitioners' motion to dismiss, this petition for review of order of the Interstate Commerce Commission is ordered, and is hereby, dismissed.

Certified copies of judgment to issue forthwith.

January 14, 1982.

A True Copy:

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
DEC 17 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1579

FOR ARGUMENT

IN THE

Supreme Court of the United States

October Term, 1983

HAYFIELD NORTHERN RAILROAD COMPANY. INC.,

Appellant,

and

STATE OF MINNESOTA,

Appellant/Intervenor,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Appellee.

On Appeal From the United States Court of Appeals for the Eighth Circuit

JOINT LODGING

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SERVICE DATE
JUL 15 1981

INTERSTATE COMMERCE COMMISSION

DECISION

No. AB-1 (Sub-No. 113)F

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY--ABANDONMENT BETWEEN OELWEIN, IA AND RANDOLPH, MN

Decided: July 10, 1981

The Chicago and North Western Transportation Company (applicant or CNW), a common carrier by railroad subject to the provisions of the Interstate Commerce Act, by application filed January 30, 1981, pursuant to section 10903 et seq. of the act, seeks a certificate of public convenience and necessity permitting the abandonment by CNW of a line of railroad extending 144.8 miles between Oelwein, IA on the south, and Randolph, MN on the north. The line proposed to be abandoned (the Line) has appeared at least since May 1980 in CNW's system diagram map as required under the Commission's Regulations Governing the Abandonment of Railroad Lines and Discontinuance of Service, 49 C.F.R. Part 1121, designated as category 1, color-coded red, i.e., a line which the carrier anticipates will be the subject of an abandonment application to be filed within the ensuing 3-year period. Public notice of the proposed abandonment was duly served, posted and published by applicant as required by law. An environmental assessment was made by the Energy and Environment Branch of the Commission's Office of Policy and Analysis which concluded that, with certain reservations, abandonment of the Line will not cause significant adverse energy consumption or environmental impacts. Numerous protests to the proposed abandonment were filed with the Commission, and by order served March 16, 1981, the Commission instituted an investigation and assigned the matter for public hearing before the undersigned Administrative Law Judge.

Hearings in this proceeding were held at Oelwein on and between May 5 and May 8, 1981. The abandonment is opposed by the Iowa Department of Transportation (IDOT) and by various shippers and shipper associations. Statements opposing the proposed abandonment made by several congressional representatives from the affected area in Iowa were read into the record. Briefs have been filed by the parties and have been considered.

Appendix A to this decision is a straight-line representation of the Line showing, among other things, intersecting rail lines and alternate rail lines used or intended to be used by CNW for the movement of bridge or overhead traffic now moving or formerly moved on the Line.

Applicant operates a network of railroad lines in 11 midwestern States including, as here pertinent, Iowa and Minnesota, which, together with Missouri, comprises applicant's Central Division. The Line traverses Fayette, Bremer, Chickasaw, Howard and Mitchell Counties in Iowa, and Mower, Dodge, Goodhue, Rice and Dakota Counties in Minnesota, a total of 65.2 miles in Iowa and 79.6 miles in Minnesota. The abandonment proposal extends from railroad milepost 354.3 just north of Oelwein to milepost 457.2 south of Dodge Center,

MN, from milepost 459.0 north of Dodge Center to milepost 496.9 near Randolph, and from milepost 1.2 at Hayfield, MN to milepost 5.2 at Waltham, MN. Excluded from the abandonment proposal, as seen, are 1.8 miles of CNW's line at Dodge Center. Identified below are the affected stations on the Line, their milepost locations, and the approximate populations residing thereat:

Stations	Mileposts	Populations
Westgate, IA	358.1	214
Sumner, IA	365.8	2,170
Fredericksburg, IA	375.7	912
New Hampton, IA	384.6	3,621
Alta Vista, IA	395.5	283
Elma, IA	398.9	601
Riceville, IA	409.3	877
McIntire, IA	414.9	234
Elkton, MN	431.5	134
Sargeant, MN	442.5	85
Waltham, MN	5.2	189
Hayfield, MN	448.9	937
West Concord, MN	467.4	718
Kenyon, MN	476.8	1,575
Nerstrand, MN	483.3	231
Dennison, MN	488.6	203

The Line was formerly a main line of the Chicago Great Western Railway Company and was acquired by applicant's predecessor, the Chicago and North Western Railway Company, pursuant to a merger approved by the Commission in 1968. Although the Line is identified as "Main Line Corridor" in a 1973 agreement CNW maintains with employee unions covering crew consists, it now serves basically as a way-freight branch line according to the manager, until February 1, 1981, of CNW's Central Division. The condition of the Line ranges from poor to fair to good, and more than 50 percent of the mileage on the Line is restricted to a speed of 10 miles per hour. The rail in the Line is 50 percent 115-pound, 45 percent 90-pound, 3 percent 112-pound and 2 percent 100-pound. About 95 percent of the main track rail is considered reusable if removed. Ties on the Line are in poor to good condition, with about 223,500 ties considered usable elsewhere if removed. The ballast on the Line is mostly slag, with a number of miles of rock, gravel and chats in generally fair condition. Maximum grades are 1.02 percent northbound and 0.99 percent southbound, and there are 107 curves with a maximum curvature of 4 degrees 30 minutes. There are 5 overhead highway bridges and 1 overhead railroad bridge on the Line, and 201 spans of pile bridge, 35 steel spans and 309 culverts. There are 177 public and 89 private main track road crossings at grade, of which 36 crossings have automatic protection. About 76 percent of the right-of-way is fenced, with fences in generally fair condition. There are various buildings at six points in Iowa and four points in Minnesota, consisting of depots, sheds, tool-houses, and the like.

Train service on the Line is presently provided by a 5-day way-freight assignment as follows: Oelwein to New Hampton on Mondays, New Hampton to Dodge Center on Tuesdays, Dodge Center to New Hampton on Wednesdays, New Hampton to Oelwein on Thursdays, and Oelwein to New Hampton and return on Fridays. Waltham is apparently served once a week, either on Tuesday or Wednesday. This train does not now serve the Line north of Dodge Center, service to this area being provided, usually once a week, by CNW's Twin Cities Division on its South St. Paul-Randolph wayfreight train. Until December 1, 1980, the Oelwein-Dodge Center train also served the Line north to Randolph, and prior to June 10, 1980, service on the Line was provided by through trains operated between St. Paul, MN and Oelwein, with a crew change at

Randolph. Service on the Line has varied from time to time, it appears. For example, Exhibit F to the application, an analysis of train service on the Line, shows that during the second week of January 1978, the train ran from Dodge Center to Oelwein on Monday, from Oelwein to Dodge Center on Tuesday, from Dodge Center via Waltham to Oelwein on Wednesday, from Oelwein to New Hampton and return on Thursday, from Oelwein to Dodge Center on Friday, and from Dodge Center to New Hampton and return on Saturday. The Exhibit also shows that during the third week of July 1980 the train ran from Dodge Center via Waltham to Oelwein on Monday, from Oelwein to Dodge Center on Tuesday, from Dodge Center to Randolph and return on Wednesday, from Dodge Center to Sumner on Thursday, and on Friday from Sumner to Oelwein and from Oelwein via Waltham to Elkton. The train completed 149 cycles in 1978, 150 cycles in 1979, and 87 cycles in the first seven months of 1980.

The products transported in greatest volume on the Line are corn, soybeans, fertilizers, food products and hazardous materials. Shown below are the number of cars and tons of carload freight originated and/or terminated on the Line, in total and for the principal commodities transported, during 1978, 1979, and the base year, 1/ the 12-month period ended July 31, 1980:

Commodities	1978		1979		Base Year	
	Cars	Tons	Cars	Tons	Cars	Tons
Corn	1,098	70,161	740	52,786	607	42,468
Soybeans	135	9,530	88	5,749	66	4,290
Food Products	214	12,281	291	15,689	292	15,417
Potash	386	38,054	449	44,454	518	51,389
Nitrogen Fertilizers	48	4,376	56	5,232	47	4,358
Phosphate Fertilizers	187	16,978	182	17,110	192	18,450
Other Fertilizers	15	949	26	1,505	24	1,339
Calcium Chloride	34	1,592	28	1,383	22	1,146
Plastic Products	31	1,853	28	2,110	31	2,479
Anhydrous Ammonia	37	2,683	16	1,096	15	1,163
Combustible Liquids	36	3,072	35	2,967	15	1,278
Corrosive Material	12	977	16	1,560	51	4,798
All Commodities	2,695	189,065	2,288	168,060	2,109	160,023

Applicant points out that traffic on the Line has been declining, and asserts that this decline has occurred even though the Line has been receiving its equitable share of available cars for loading. Shippers at the southernmost station on the Line, Westgate, for example, ordered a total of 257 cars in 1978, and 206 cars were placed, about 80 percent of the cars ordered. At Riceville in 1979, 208 cars were ordered and 203 cars placed, or about 97 percent. In 1980 at McIntire 121 cars were ordered and about 61 percent, or 74 cars, were placed. At all stations on the Line, during the 6-month period April through September 1978, a total of 774 cars were ordered and 612 cars were placed, about 79 percent, and during a comparable period in 1980 a total of 295 cars were placed, or 59 percent of the 497 cars ordered. During the entire period April 1977 through December 1980 the percentage of cars placed to cars ordered ranged from 59 percent to 88 percent. Systemwide, on the other hand, the number of grain cars,

1/ The Commission's Abandonment Regulations define the base year as the latest 12-month period, ending no later than six months prior to the filing of the abandonment application, for which data has been collected at the branch level as prescribed in section 1121.40(b) of the Regulations. The latter section prescribed that the collection and compilation of such data shall be in accordance with the Branch Line Accounting System (49 CFR 1201) established pursuant to section 205(e)(1)(a) of the Regional Rail Reorganization Act of 1973, as amended.

boxes and covered hoppers, ordered on the first day of each month in 1979 totaled more than 19,000 cars, and only about 18 percent of the cars were placed. In 1978 that percentage was less than 15 percent.

The decline in grain and soybean traffic is attributed by applicant to the transportation and marketing alternative provided by the close-by Mississippi River barge facilities and to the availability of nearby processors at Cedar Rapids and Clinton, IA. According to applicant, moreover, the Line plays an "insignificant" part in the marketing of the grain produced in the area. Based on Iowa and Minnesota agricultural statistics, applicant estimates that the Iowa counties traversed by the Line produced about 78.2 million bushels of corn in 1979, and three of the five counties in Minnesota traversed by the Line produced in that year about 41.6 million bushels. On the Line in that year, on the other hand, CNW transported only a little more than 1.5 percent of the corn produced in the area, and less than one percent of the soybeans. Similarly, of the 942,000 tons of fertilizer materials consumed by farmers located within a 25-mile radius of the Line in 1979, according to applicant, only a little under 70,000 tons was terminated on the Line, about 7 percent of the volume consumed. With regard to the transportation of these products, and others, it is applicant's position that the Line is used by shippers as stand-by transportation, that alternate modes of transportation and marketing options are readily available to shippers and consumers, and that with some shifting of suppliers and markets and some revision of ordering practices and shipping patterns abandonment of the Line will have minimal impact on the economy of the area.

Applicant has been having some operating difficulties on the Line. A substantial portion of the Line, as stated, is limited to a speed of 10 miles per hour, and only on about 20 miles of the Line are trains permitted to operate at the maximum timetable speed of 40 miles per hour. Much of the track is said to be rough, with bad cross level, and portions of the Line cannot be surfaced without installing ties and ballast. Line deterioration and excessive slow orders have from time to time necessitated embargoes of hazardout materials to or from particular stations, and it is not uncommon, particularly during cold weather, to have 15 broken rails a day reported in the 90-pound rail. Snow clearance problems occur, primarily in the rugged terrain between Dodge Center and Randolph, and many derailments have been caused by cross level variations in the Line where slow orders are in effect. The slow orders have also made it increasingly difficult to operate trains on the Line without relieving crews en route to comply with the Hours of Service Law. During cold weather particularly, when only about half the trains are able to make the complete run in compliance with hours of service, added expense is incurred in transporting relief crews for smaller as well as for larger trains, despite adequate diesel units, mostly 1,500 horsepower, 4 axle, GP-7 class units.

The primary impetus for the proposed abandonment is financial. Applicant alleges that operation of the Line exerts a financial drain on the railroad, and that continued operation will constitute an undue burden on interstate commerce. Exclusive of overhead traffic considerations or opportunity costs, the avoidable loss from operation of the Line is computed by applicant as $326,850 for 1978, $303,234 for 1979, $135,491 for the first 7 months of 1980, and $174,266 for the base year. Appendix B is a table prepared by applicant as required under section 1121.41 et seq. of the Abandonment Regulations, showing revenues and costs associated with the operation of the Line for 1978, 1979, the first 7 months of 1980, and the base year, and also for an estimated subsidy year as required under section 10905 of the act. This table, as seen, takes no cognizance of overhead traffic revenues or costs. Prior to filing the application, CNW had requested a waiver of filing requirements concerning overhead traffic, revenues and

costs, on the ground that CNW does not intend using the Line to transport overhead traffic in the future, regardless of the outcome of this proceeding, that such traffic will be retained by CNW over another line in its system, and that data associated with overhead traffic will not be relevant in determining the burden upon applicant from continued operation of the Line. By order served February 27, 1981, the Commission granted the waiver. The Commission made it clear, however, by a later order served April 9, 1981, in which it denied IDOT's petition for reconsideration of the waiver, that the waiver was without prejudice to demonstration by protestants during the course of the proceeding that overhead traffic data is relevant and that the record should be supplemented accordingly. In the meantime, by use of interrogatories, IDOT attempted to obtain overhead traffic data from CNW, without success. Subsequently, on IDOT's motion, by an order served April 10, 1981, the Judge directed CNW to divulge that information, and ultimately, as later discussed, data relating to overhead traffic on the Line, and corresponding revenues and costs, were made a part of the record.

The amounts shown in Appendix B were computed by applicant in the manner prescribed in the Abandonment Regulations. As seen, lines 2, 5(f), and 6(b) relate to overhead traffic, and are left blank by applicant because of the waiver. Lines 9 and 13(b) are also blank. The latter represents income tax benefits from the abandonment; none, since applicant is not in a tax-paying position, and the former reflects rehabilitation expenditures to bring the Line into compliance with FRA Class 1 safety standards; none, since the Line is now in compliance with those standards. Line 1 represents total system revenue earned by CNW on traffic originating or terminating on the Line, without prorate, including CNW's division of revenues on traffic interlined with connecting carriers. Line 3 represents revenues from such services as demurrage, switching, leasing of land or track facilities, and the like. Lines 5(a) through 5(j) represent the various on-branch costs incurred in operating the Line, and 6(a) the off-branch costs related to traffic originating or terminating on the Line, computed by use of the Rail Form A costing method. Line 8(b) represents opportunity costs incurred by CNW as a result of not being able to better utilize the assets embodied in the Line, those initially invested as well as those infused to operate the Line. This amount is computed by multiplying CNW's cost of capital by the sum of its avoidable losses, its working capital, and its net liquidation value. Line 10 represents administrative costs which would be incurred by CNW if the Line were subsidized, computed as one percent of the total annual revenues attributable to the Line in an estimated subsidy year. Line 11 represents the cost of obtaining insurance for CNW's uninsured liability and to establish a reserve for any deductible amounts under such policy, and is blank because applicant is unable to estimate such a cost until an appropriate subsidy agreement is executed. Line 13 represents return on value of rail properties, computed as prescribed in Part 1121.44. Working capital is 15/365 of on-Line avoidable costs less depreciation, and net liquidation value is the amount computed by CNW's engineering witness, later discussed. Line 14, the rate of return applied to the valuation of property, 16.979 percent, is represented to be CNW's cost of capital for road property, that is, the average total annual return of its mortgage bonds and stocks, $14.3 million, divided by the average market value of its mortgage bonds and stocks, $84.5 million. Line 15 represents the economic cost to CNW of operating the Line, and Line 16 represents the estimated subsidy cost.

As noted, the estimated net liquidation value of the Line was developed by CNW's engineering witness, Reid, a consultant who for almost 40 years had served in various capacities in CNW's engineering department. Reid's analysis appears as Appendix C, showing a total estimated net liquidation value for the Line of $12,985,885.

Reflected therein is a valuation of $1.7 million, or about $827 per acre, for the 2,100 acres of land in the Line, representing its sale value if disassembled and sold in separate parcels. The land was evaluated by CNW's real estate manager, and reflects a discount of 40 percent to allow for shape, topography, location and quality of title. In the latter regard, about 90 percent of the land in the Line was acquired by warranty deed. Land acquired by right-of-way deed, condemnation or easement was excluded from the valuation. The valuations for all scrap items shown in Appendix C are based on current prices received by CNW for scrap of like kind over a 6-month period. Usable bridge timber and switch ties are valued at 50 percent of current new price, and usable bridge steel is valued at 60 percent of new. Usable cross ties are valued at the average price paid by CNW for usable ties in 1979. Usable rail is valued at 70 percent of current new price. In the latter regard, current new price is the market price in late 1980, and the percentage applied, usable 70 percent of new, was established several years ago by CNW based on many factors. It may be noted, also, that although a section of 115-pound rail is more expensive than, for example, a section of 90-pound rail, all weights of rail are valued uniformly per net ton of usable rail. Other track material, usable, is valued at 75 percent of new, as are signal equipment, a hot box detector, and buildings. The estimated costs for removing bridges, tracks, signals, communications systems, and buildings, and to restore grade crossings are based on CNW's experience over the last decade in removing more than 2,500 miles of track.

CNW's engineering witness, Reid, also calculated the avoidable costs of maintaining ways and structures on the Line as shown in Appendix B, including estimated costs for the subsidy year to maintain tracks, bridges and other facilities to comply with Federal Railroad Administration track safety standards for Class 1 track, as set forth in line 5(a) in the final column. The latter amount, $741,585 or $5,079 per mile, contrasts sharply with applicant's system average cost for maintenance of ways and structures, $15,231 per mile annually in 1978-79, and with the average annual expenditure on the Line during those years as developed from CNW payroll and material charge-out records, $2,969 per mile. In the latter regard, some of the costs projected for the subsidy year are well above corresponding actual expenditures on the Line. For example, the costs projected for ties, running, $159,280, contrasts with $2,148 expended in 1979 and $625 during the base year, and the projection for rail, running, is $4,935, as compared with $252 in 1979 and $1,112 in the base year. An even sharper contrast is provided by ballast, running, $509 during the base year projected at $19,185, and roadway machines, projected at $75,174 as compared with zero expenditure during the base year. Applicant defines the projected annual maintenance cost, $741,585, as the average annual cost of maintaining the Line in Class I condition over an extended period of time, a 40 to 50 year period. Applicant acknowledges that maintenance expenditures presently and in recent years have been far below projected costs, and reflect CNW's policy of maintaining its lines in a safe condition while keeping its operating losses at a minimum on marginal lines. Under this policy the Line "was allowed to deteriorate from Class II or better to basically FRA Class I (10 m.p.h.)."

The deteriorated condition of the Line was a fetor considered by CNW's management when the decision was made in June 1980 to divert overhead traffic from the Line. According to CNW's Vice President, Transportation, Burkhardt, an intensive inspection of the Line by IDOT had disclosed a number of violations and deviations from FRA track standards, and the railroad was faced with the prospect of making substantial expenditures to correct the condition of the Line. The Line was corrected to Class I standards at minimal cost, but to upgrade the Line to Class II or Class III standards, considered necessary for effective overhead operations, would have cost "millions of dollars,"

according to Burkhardt. Since 1974, also, when for the first time the Oelwein-Randolph line and CNW's somewhat parallel Marshalltown-Mason City line came under the jurisdiction of the same division, CNW's management had become increasingly aware of the economies possible in consolidating over one line the traffic moving over both lines at less than capacity. At division level at least, a management decision was made to upgrade the Marshalltown-Mason City line and to relegate maintenance on the Oelwein-Randolph line to a lower priority. Applicant is also leasing, and in a pending proceeding seeks authority to purchase, some 800 or more miles of line of the bankrupt Rock Island Railroad, including a 500-mile main line between St. Paul, MN and Des Moines, IA which roughly parallels the Oelwein-Randolph line. At the present time, according to Burkhardt, overhead traffic formerly moving over the line is being routed over the Rock Island leased line, the Marshalltown-Mason City line, a CNW main line between Minneapolis, MN and Chicago, IL via Wisconsin, and a CNW line between Minneapolis and Council Bluffs, IA via Sioux City, IA. Speaking for CNW management, Burkhardt stated flatly that as a matter of managerial discretion CNW will no longer route overhead traffic over the Line, regardless of the outcome of the instant proceeding. Burkhardt was candid in stating that this decision, made in June 1980, as stated, and largely his, was made in contemplation of this proposed abandonment.

As previously indicated, some difficulty was encountered in obtaining for this record data relating to the volume, and corresponding revenues and costs, of the overhead traffic handled on the Line during the time periods for which applicant is required to file traffic and financial data in this abandonment proceeding. Data relating to overhead traffic is not ordinarily separated out as to a particular line by CNW, and, as noted, applicant had been granted a waiver prior to filing the application. The time frame available for gathering this data once the Judge had ordered its production was brief, and a vast number of records had to be examined to isolate this data. CNW's computers are not set up to capture traffic that specifically moves over a particular line, so CNW fed into the computer data for all overhead traffic that moved between Oelwein and Randolph, between Oelwein and Dodge Center, and between Dodge Center and Randolph, and developed an estimated summary of overhead traffic that might have moved on the Line, estimated because without individual examination of car records it cannot be ascertained whether these cars actually moved over the Line and not over other alternate lines. By stipulation of the parties, in recognition of the exigencies of the brief time span available for compilation of this data, the results of these computer runs were accepted as showing the overhead traffic on the Line moved during 1978, 1979, and the first seven months of 1980. Using the revenue data developed in these computer runs, CNW's Director of Special Studies, Brauner, computed overhead costs on the Line to derive the net operating results attributable to overhead traffic as follows:

	1978	1979	1980 (7 months)
(A)			
Revenues	$6,280,277	$7,263,710	$4,282,578
Line Haul Expense:			
Car-Mile Costs	$2,555,967	$2,834,497	$1,410,141
Ton-Mile Costs	$1,128,002	$1,244,938	$ 650,088
Net Revenues	$2,596,308	$3,184,275	$2,222,349
(B)			
Revenues	$6,280,277	$7,263,710	$4,282,578
Line-Haul Expense:			
Car-Mile Costs	$2,296,184	$2,507,948	$1,226,260
Ton-Mile Costs	$1,122,656	$1,237,025	$ 647,675
Net Revenues	$2,861,437	$3,518,737	$2,408,643

(A) = Based on replacement costs of cars.
(B) = Based on historical costs of cars.

As seen, two separate computations were made; the first is based on replacement costs of the cars that might have moved on the Line and assumes that all of the cars were CNW-owned cars, and the second is based on the historical value of the cars and assumes that all of the cars were foreign-owned cars. Inasmuch as the CNW witness did not examine the individual overhead movements he could not testify as to whether or to what extent the movements were in CNW or foreign cars. Given the stipulated methodology, however, the actual net revenues from overhead traffic during the stated periods, in his opinion, would be "somewhere in between" the A and B totals shown above. Because of the limited time available to make the computations, Brauner used Rail Form A costs, basically average costs, but had there been sufficient time he would have calculated actual costs, and in lieu of the computer runs previously described would have calculated revenues from wheel reports, actual car records and waybills to determine actual revenues allocable to the Line.

Throughout this proceeding applicant has adhered to its position, previously stated, that overhead traffic data is not relevant to this investigation because such traffic has been diverted from the Line and because revenues from such traffic will be retained by the carrier over other lines of CNW. As seen in the table above, CNW's revenues from overhead traffic handled on the Line were substantial during the periods indicated. On an annual basis, prior to June 1980, CNW handled about 35,000 carloads a year of overhead traffic on the Line. Despite the management decision in June 1980 to divert overhead traffic from the Line, such traffic has continued to move over the Line in some volume. Between June 1980 and May 1981 a total of 69 trains moved on the Line hauling overhead traffic. Of these, 13 were trainloads of potash moving south on the Line from Canadian origins, a total of 948 cars aggregating more than 123,000 tons. Eight of the trains moving north on the Line were made up entirely of empty cars from the potash trains, an aggregate of almost 600 empty cars. All of this potash was destined to Waterloo, IA. Additionally, some 22 trains moved southbound on the Line and 26 trains moved northbound, all hauling other commodities in overhead traffic. The bulk of this movement occurred in November 1980, when CNW's leased Rock Island line, previously mentioned, was undergoing repairs. These 48 trains were comprised of 1,799 loaded cars and 2,207 empties, an aggregate of almost 223,000 tons. CNW regards this post-June 1980 overhead traffic on the Line as a series of irregular movements, handled on the Line as

as a matter of convenience. Overhead traffic in regular scheduled train service, applicant insists, was discontinued on the line in June 1980. In any event, CNW's chief operating officer on its Central Division, testifying in rebuttal, stated categorically that "We will not operate overhead traffic on this line."

It is applicant's position, as stated, that abandonment of the Line will have minimal effect on shippers and receivers located along the Line. In the application, as required, applicant described alternate sources of transportation, rail and motor carrier, available to these shippers and receivers. Applicant's witness at the hearing, Amburn, its district sales manager whose sales territory embraces the Line between Randolph and the Minnesota state line, attempted to amplify and supplement this data. It became apparent during the course of cross-examination that this witness had little or no personal knowledge with respect to the motor carriers operating in the involved area, particularly in Iowa, and was acting merely as a conduit of information derived by telephone or otherwise from others. On motion of protestants, Amburn's testimony was stricken. The state of the record is that there are many motor carriers operating in the area, but little or nothing is disclosed with regard to their operations, their available equipment, or the commodities they transport. To some extent, however, cross-examination of various shippers and receivers, protestants herein, disclosed relevant information pertaining to one or another of the various motor carriers operating in the area.

The act requires the Commission, in approving the abandonment of a line of railroad, to impose conditions for the protection of carrier employees. Early in the hearing applicant agreed to the imposition of labor protective conditions as set forth in Oregon Short Line Railroad Company, Abandonment--Goshen, 360 I.C.C. 91 (1979), sometimes referred to as the Oregon III conditions. These conditions have been found by the Commission in numerous proceedings to satisfy the statutory requirements, and are customarily imposed in abandonment proceedings. The legislative director of the United Transportation Union, appearing in this proceeding to represent carrier employees, stated on the record that imposition of the Oregon III would satisfy the interests of the employees.

The proposed abandonment is opposed by IDOT, specifically, that portion of the Line located in Iowa between Oelwein and McIntire. IDOT is an agency of the State of Iowa responsible for the planning, development, regulation and improvement of transportation in that State, and it represents the State's interest in rail abandonment proceedings before this Commission. IDOT completed formulation of its "Iowa Rail Plan" in March 1978, during the course of which its inventory of the system of rail transportation in Iowa disclosed that "in Iowa we had too many miles of railroad," and that "Iowa has more rail lines than a healthy system can support." Accordingly, IDOT adjusted its former policy of arbitrarily opposing rail abandonments, and instead supports abandonment of those lines that are not essential to Iowa's rail system and opposes abandonment of only those lines which it economic analysis indicates are viable lines. Under this policy, out of the last twenty abandonments in Iowa IDOT has opposed only four. IDOT's primary tool in evaluating rail abandonments is the benefit/cost ratio, a numerical rating derived from dividing the quantifiable benefits to shippers and the public if the line is kept in service, by the cost to the railroad of upgrading and maintaining the line in service. The result of such a calculation determines for IDOT whether a particular rail line proposed for abandonment is viable and should be retained. In strict economic terms, according to IDOT's director, a benefit/cost ratio equal to or greater than 1.0 is indicative that the public interest is best served by preserving a particular rail line. However, IDOT's method of determining benefits assumes that shippers will choose their next best alternative for

transporting goods to market if rail service is lost. Consequently, IDOT considers that actual benefits accruing to shippers are usually greater than those computed in economic analyses because shippers lack the computer's "perfect" knowledge of available transportation alternatives and alternative markets. Therefore IDOT regards a benefit/cost ratio of 0.75 or greater as an indication that a line is viable or potentially viable for the shippers and for the public. For the Oelwein-McIntire segment of the Line IDOT calculates a benefit/cost ratio of 1.27, and alleges that, with aggressive marketing, improved efficiency of operation, and the possible imposition of surcharges, the Line (that portion in Iowa) can be operated profitably by CNW.

In order to calculate a benefit/cost ratio for the Line IDOT first gathered its basic data, i.e., commodities shipped, volumes of traffic shipped, etc., obtaining such data from the abandonment application and from survey questionnaires submitted by the shippers along the Line. An analysis was made, into which was factored rail user benefits and public benefits. Rail user benefits are defined as the total annual transportation and handling cost savings to grain shippers, fertilizer receivers, and other shippers and receivers on the Line if the Line is not abandoned. These include, among others, net additional trucking costs to or from alternate rail heads or markets, net changes in product handling or facility costs, and net changes in product values resulting from changed markets. Public benefits are defined as the added highway construction and maintenance costs incurred by local governments if a line is abandoned. Not taken into consideration in this instance were other public benefits, such as lost employment and income, environmental and safety impacts, due to the difficulty of quantifying their value. The costs factored into the benefit/cost ratio are the costs of rehabilitating the Line to a 263,000-pound carrying capacity at a minimum speed of 25 miles per hour (FRA Class II), a level considered by IDOT to be adequate to meet the needs of shippers on the Line, and the costs of maintaining the Line at that level. These costs were calculated, in current dollars, by first computing the gross cost of rehabilitation to FRA Class II and converting this to net value by subtracting the salvage value of the rail which would be replaced and adding the opportunity cost attributable to the railroad's inability to liquidate the entire Line at the current time. The net upgrading cost is annualized by capitalization over a 35-year period at a real capital cost equal to 7 percent per year, and the annualized salvage value of the upgraded Line at the end of its useful life is subtracted therefrom, assuming again a 35-year life and 7 percent capitalization rate. Finally, the annual normalized maintenance cost is added. IDOT estimated a cost of more than $5 million to upgrade the Iowa portion of the Line to FRA Class II, and capitalizaing the upgrading cost over 35 years and adding an annual track maintenance allowance yielded a yearly cost of $796,000 to keep some 66.1 miles of Iowa line in service. The corresponding rail user and public benefits came to $1.013 million, and the resulting benefit/cost ratio calculates, as stated, to 1.27. This ratio assumes that the Line is upgraded and that traffic increases as a result. On a "worst case" basis, assuming upgrading but no increase in traffic, the benefit/cost ratio would be 0.80, and it would be 1.87 assuming no upgrading and no increase in traffic. None of these calculations gave consideration to overhead traffic.

IDOT also offered the testimony of Johnson, an experienced railroad engineer, who had inspected the Line between Oelwein and the Minnesota State line. Johnson concurred generally with Reid's evaluation of the condition of the Line and his estimated maintenance costs, but differed on net liquidation value. Based on his own experience and discussions with vendors, Johnson estimated a price of $275 per ton for 115-pound rail, $270 per ton for 112-pound rail, $235 for 100-pound rail, and $225 for 90-pound rail. Based on these unit prices Johnson adjusted downward the net liquidation value by more than $2 million. An additional downward adjustment of $113,200, the

net salvage value of some 12 miles of sidetrack, was made to reflect the witness' opinion that these unused tracks could be removed without abandonment and without affecting the operation of the Line. Johnson thus estimates a liquidation value for the entire Line of $10,813,585, and based on the same valuations a net liquidation value of $2,161,544 for the segment between Oelwein and New Hampton and $1,903,325 between New Hampton and McIntire, or $4,064,869 for the Iowa portion of the Line.

A research engineer, McEwen, employed by one of the largest contracting and engineering firms in the country, testified for IDOT. McEwen was critical of applicant's computation of its cost of capital, its rate of return, and its opportunity costs. According to McEwen, CNW selectively excluded major segments of its capital structure in computing its cost of capital and its debt/equity ratio, failing to consider such items as equipment trusts, sinking fund bonds, income bonds, debentures, bank and government loans, and preferred stock. Using what he calculated as CNW's actual cost of capital, 9.02 percent, and CNW's actual debt/equity ratio, 91 percent debt to 9 percent equity, McEwen calculated CNW's cost of new capital to be 12.1 percent, and adjusted this by an anticipated future inflation factor of 9.7 percent to reach a 2.4 percent cost of capital. Based on the net liquidation value of the Line as computed by Johnson, $10,813,585, McEwen found that an adequate rate of return for CNW fell between 2.4 percent and -0.68 percent. The latter figure is predicated on a 91/9 percent debt/equity ratio and corresponding interest rates of 7.83 and 21.05 percent weighted to an average of 7.13 and 1.89 percent, and the result reduced by a future inflation factor of 9.7 percent. On this basis, and exclusive of overhead revenues, McEwen concluded that CNW's opportunity costs ranged between $73,908 and $260,853 for the subsidy year.

Another engineer, Ekegren, employed by the same company, testifying for IDOT, evaluated the segments of the Line in Iowa, Oelwein to McIntire and Oelwein to New Hampton, to determine their profitability. For this purpose, Ekegren designed an operating plan for each segment which assumed Oelwein to be the starting point and that all cars would enter and leave the Line at Oelwein. Train operation schedules were based on CNW's 1980 conductor work reports to determine average running time between stations and average switching time. Both plans assumed twice a week service, or two round trips a week. The entire Iowa segment, Oelwein to McIntire, was calculated to be 67 miles in length, and based on actual running and switching times in late 1980 was determined to require 16.5 hours for a complete round trip. According to Ekegren, this segment accounts for 75 percent of the traffic originating or terminating on the Oelwein-Randolph Line. The operating plan, Oelwein to New Hampton, 32 miles, required 9 hours for a round trip. This segment accounts for 51 percent of the Oelwein-Randolph traffic. Except for administrative expense, which was estimated by Ekegren, and net liquidation value and rate of return, which were based, respectively, on Johnson and McEwen's calculations, Ekegren's computations were based on CNW's data, prorated as appropriate based on miles or carloads, or were recomputed from CNW source data. Exclusive of opportunity costs or overhead traffic, Ekegren concluded that Oelwein-New Hampton operations would yield a profit of $27,613 over the subsidy year, and that Oelwein-McIntire operations would incur an avoidable loss of $94,941. IDOT emphasizes that these results are based on historical traffic data only and do not reflect shipper projections of potential traffic or overhead traffic. Ekegren also recalculated revenues and costs on the entire Line, Oelwein to Randolph, for 1978, 1979, and the first 7 months of 1980, including opportunity costs as computed by applicant but factoring in overhead revenues and costs as accepted in this record. The results reached by Ekegren was a profit of $1.6 million for 1978, $2.3 million for 1979, and $1.7 million for seven months 1980.

The proposed abandonment, in its entirety, is opposed by the Northeast Iowa Transportation Association (NEITA), an informal association of shippers and receivers located at various points in Iowa along the line.2/ Witnesses for 18 of NEITA's member firms testified in opposition to the proposed abandonment. Appendix D hereto is a synopsis of the evidence offered by NEITA's witnesses. NEITA emphasizes that Iowa shippers originated and terminated the great bulk of the traffic moving on the Line. In the 2-year, 7-month period, 1978 through July 1980, for example, Iowa shippers were responsible for more than 77 percent of all traffic moving on the Line, exclusive of overhead, including more than 50 percent of all fertilizers received on the Line and almost 87 percent of all grain originated. NEITA points out that CNW's marketing manager, grain and grain products, acknowledged in his testimony that grain elevators which have, and use, rail service can receive, on the average, from 4¢ to 7¢ extra per bushel of grain, and can pass this price advantage along to farmers. On the basis of 6¢ per bushel for the actual number of bushels shipped in 1980 by seven NEITA members, NEITA alleges that these shippers would incur additional annual costs of more than $111,000 if they are deprived of rail service, and that northeast Iowa farmers generally would receive less for their grain in an annual amount ranging between $315,000 and $440,000. With regard to fertilizers received on the Line, NEITA notes that CNW's market manager, chemicals and fertilizers, testified that fertilizer receivers deprived of rail service could experience added trucking costs of up to $6 per ton. Using what it regards as a more realistic $8.40 per ton, NEITA alleges that, based on tons of dry fertilizer actually received in 1980, eleven receivers of fertilizer on the Line would have added transportation costs aggregating more than $342,000 per year if the Line is abandoned. In the aggregate, according to NEITA, its member firms would incur additional costs of more than $729,000 annually, if this Line is abandoned, and in the process of adjusting or rebuilding their facilities to ship or receive their goods without rail service these companies would incur one-time capital costs ranging between $766,000 and $800,000.

The proposed abandonment is opposed, also, by a group of shipers and receivers located in Minnesota, referred to collectively herein as MnShp,3/ and by the Hayfield Development Corporation (Hayfield), an entity formed to encourage and assist businesses to locate and expand in the Hayfield, MN area. These protestants oppose the abandonment only of about 19.2 miles of the Line, that is, between milepost 442 near Sargeant, MN and milepost 457.2 near Dodge Center, MN, and between milepost 1.2 near Hayfield, MN and milepost 5.2 near Waltham, MN. This segment of the Line (the Sargeant-Dodge segment) runs immediately south of CNW's east-west main line between Mankato, MN and Minnesota City, MN, which intersects the Line at Dodge Center. According to MnShp the Sargeant-Dodge segment is accessible from either the east or the west to trains operating on the intersecting main line. MnShp alleges that the Sargeant-Dodge segment is in good condition and, standing alone, a profitable line of railroad to be

2/ Andersen's Agricultural Center, Ltd.; C & H Farm Supply Co.; Custom Agricultural Center, Inc.; D & V Grain Handling; Farmers Butter & Dairy Co-op; Farmers Feed & Grain Co., Inc.; First Miss, Inc.; Fredericksburg Farmers Co-op; Hancor, Inc.; Hillandale Farms of Iowa; Howard County Equity; Kitchens of Sara Lee, Inc.; Maynard Cooperative; McIntire Feed & Grain, Inc.; Meinerz Creamery, Division of Beatrice Foods Co.; Midland Cooperative, Inc.; Overton Chemical Sales; Ralston Purina Co.; H. J. Schult and Son; Thermogas Company; Tolliver Farm Supply; Wayne's Ag., Inc.; and Westgate Elevator Co., Inc.

3/ Power Span, Inc.; Midland Cooperatives, Inc.; Brownsdale Cooperative Association; Reese Farm Center, Inc.; Mower County Service Company; Century Plastics, Inc.; Farmers Cooperative Oil Association; Hunting Elevator Company, Inc.; Hayfield Lumber Company; Nelson's Gas, Inc.; and Sargeant Grain Company.

increasingly profitable in the immediate and long-term future. MnShp takes the position that this segment is operationally feasible as a branch line or spur in connection with operations on the east-west main line at Dodge Center, and should not be abandoned. Hayfield joined MnShp in urging that this segment be retained in service. The economy in the Hayfield area has been expanding for several years, and Hayfield fears that abandonment of rail service to and from the area may cause new businessees to decide against locating in the area and thus adversely affect the area's growing economy.

The evidence of the shipper-receiver witnesses presented by MnShp is summarized in Appendix E. Additionally, MnShp presented several highway engineers employed by the Minnesota Department of Transportation and by Dodge and Mower Counties in support of its position that adequate alternate modes of transportation are not available to these Minnesota shippers. Their testimony, in substance, was to the effect that state and county highways in the proximity of the Line, in particular the Sargeant-Dodge segment, are subject to seasonal weight restrictions, and that funds for improvement of the highways are not available to Dodge and Mower Counties at this time. MnShp also offered the testimony of a consultant, Shaffer, who analyzed operations on the 19.2-mile segment for the base year and estimated operations for a pro forma year, utilizing in the latter regard the projections made by the Minnesota shippers and receivers. In assessing the financial results of operations on the 19.2-mile segment Shaffer utilized the actual revenues from the traffic during the base year of the protesting Minnesota shippers and applied applicant's unit costs to compute off-Line avoidable costs, except that costs for the junction at Dodge Center are CNW's Rail Form A costs per inter/intra train switch in lieu of the modified terminal costs used by applicant. In calculating on-Line avoidable costs Shaffer used actual costs as developed by CNW, prorated and allocated to protestants' traffic on the basis of gross ton miles, car miles and car days, and crew and locomotive time. Exclusive of overhead or opportunity costs the consultant calculated net revenues on the 19.2-mile segment for the base year of $64,872. In developing operating results for a pro forma year Shaffer added the revenue from some 269 additional cars, aggregating more than 13,000 additional tons, and allocated expenses on the same basis as with existing traffic. In this manner Shaffer estimated net revenues for a pro forma year of more than $157,000. Neither calculation reflected CNW's opportunity cost for the 19.2-mile segment, which Shaffer estimated to be $181,608. On the basis of Shaffer's calculations, MnShp alleges that the truncated Sargeant-Dodge segment, if retained in operation, would yield sufficient revenues to cover all operating expenses, plus about 36 percent of the opportunity costs during the base year and 87 percent of such costs during a pro forma year. The witness also suggested a possible scenario for future operations on the 19.2-mile segment, service to be provided by a switching crew at Rochester, MN which would operate over the east-west line of CNW that intersects the Line at Dodge Center. Shaffer did not develop a complete operating plan, however, because, as he stated it to railroad counsel, "...nothing I did you would agree with...whatever I did you would fight and squabble about it for days, so it wasn't worth me even trying."

The proposed abandonment was also opposed by the Zumbro Valley Shipper Association, an informal association of shippers in the Kenyon-Nerstrand area in Minnesota. Counsel for this protestant appeared at the hearing, but offered no evidence, and did not file a brief.

On brief, protestants uniformly contend that the Line has been operated at a profit during the period 1978 through seven months of 1980. Based solely on applicant's financial data adduced herein, and merely "plugging in" the net revenues acknowledged by applicant from

overhead traffic on the Line during this period, protestants assert that the operations on the Line yielded a profit of $2,402,023 in 1978, $3,048,272 in 1979, and $2,180,005 during the first seven months of 1980. These results are predicated on consideration of overhead traffic moving on the Line as well as local traffic, as required, according to IDOT, by the Commission's abandonment regulations. Protestants uniformly condemn applicant for attempting throughout this proceeding to obscure or bury this overhead data despite the fact that overhead traffic on the Line moved to a volume of some 35,000 cars a year prior to June 1980 and in substantial volume thereafter. In this regard IDOT asserts that applicant misrepresented the facts to the Commission in applying for its waiver of overhead data, and on this record has not shown that it will, in fact, retain its overhead traffic over other lines. This Line has been profitable, according to protestants, even after consideration of opportunity costs as computed by applicant, in amounts exceeding $1 million annually. IDOT, in particular, alleges that applicant has grossly overstated its opportunity costs, moreover, by means of inflated net liquidation values and incorrect application of rate of return, and has failed to specify where in its system the reusable assets from the Line will be reinvested. According to IDOT, congress did not intend for the Commission to authorize the abandonment of particular rail lines solely because the carrier's capital investment could more profitably be put to work elsewhere. All of the protestants allege that shippers and the general public along the Line will be adversely impacted by the proposed abandonment, and that applicant has completely failed to establish that there are adequate alternatives to rail service in this area.

IDOT does not dispute that the railroad has experienced avoidable losses on the Line, if only local traffic is considered, or that shippers have been diverting traffic away from the Line in recent years. IDOT takes the position that this situation is attributable solely to a steady decline in the quality and quantity of the railroad's service, a decline that made it imperative for shippers, in order to survive, to find other and more dependable means of moving their freight. The testimony of the Iowa shippers shows, according to IDOT, that at least 927 additional cars of freight would have moved on the Line in 1980 if CNW had provided the cars and if service were improved. IDOT contends that at least since 1974 CNW has failed to adequately maintain the Line to carry local or overhead traffic, and that this reflects an intent on the part of CNW to downgrade service on the Line. IDOT points out that CNW's projected maintenance expense is thousands of times greater than actual, historical expenditures on the Line. Applicant has been precipitous, IDOT asserts, in rushing to abandon the Line without considering other means of relief, such as are available under the Staggers Rail Act of 1980, for example. That act provides, in section 217, that a railroad not earning adequate revenues may establish surcharges applicable to traffic originating or terminating on any line that carries less than 3 million gross tons of traffic per mile. IDOT contends that CNW has made no effort to consider this alternative and has in fact rejected IDOT's interrogatory seeking to obtain such data, and that CNW should not be permitted to abandon the Line without first studying whether this mechanism for providing relief is feasible. IDOT's analysis of the Iowa shipper testimony indicates to it that these shippers have no reasonable alternative to rail transportation, that abandonment of the Line would require shippers to expend substantial funds to convert their facilities to handle increased truck traffic, drastically affect the price farmers receive for their grain and pay for their fertilizer, and overburden the already overburdened highways. IDOT asserts that the Line is a vital link in the state's transportation network, particularly in view of the uncertain future of other lines in the area operated by a bankrupt Milwaukee Railroad and an Illinois Central Gulf Railroad in precarious financial condition. In the alternative, IDOT points to its operating plans for an Oelwein to McIntire segment or an Oelwein to New Hampton segment, segments that now provide CNW with 75

percent and 51 percent, respectively, of the local traffic moving on the Line. Considering shipper projections of potential traffic, according to IDOT, either of these segments could be operated by applicant at a profit.

NEITA also stresses the burden of abandonment on the Iowa shippers, up to $800,000 collectively in capital costs to modify or convert facilities and recurring annual costs of up to $700,000. On brief, NEITA alleges that the evidence shows an intentional downgrading of service on the Line by CNW, and that this is apparent from the withholding over a long period of time of maintenance funds from the Line despite millions of dollars earned on the Line from overhead traffic. To NEITA this reflects a matter of corporate policy on the part of CNW, devised long before the June 1980 decision to divert overhead traffic from the Line, to downgrade service on the line in order to enhance its case for abandonment. The result, inevitably, was to drive business away from the Line. Applicant also sought to enhance its case, according to NEITA, by the unique and unusual projection of maintenance expenses over a 40 to 50-year period, expenses for ties, for example, that reflect a 25,000 percent increase over actual expenditures on the Line. The record is barren, on the other hand, of any evidence of actual maintenance costs required on the Line for a reasonable future period, 3 years or 6 or 10 years, for example. NEITA alleges, also, that applicant made no effort to comply with its statutory obligation to consider various environmental impacts of the proposed abandonment, such as the cumulative effect of this abandonment in concert with the abandonment by CNW of 566 miles of track in 1980 and an additional 1,042 miles of track now in various stages of processing for abandonment by CNW. NEITA also points to the $400,000 per year being paid by CNW as rental for various Rock Island Railroad lines, including the line contemplated by CNW for movement of overhead traffic now or formerly moving over the Line, and suggests that public policy would be better served if CNW expended these funds instead on continuing rail service on the Line.

MnShp opposes the abandonment of only the 19.2-mile Sargeant-Dodge segment of the Line, as noted, and on brief contends that operations on this segment have been profitable to CNW and that the segment is in good condition with no need for rehabilitation. Based on traffic projections of Power Span, Brownsdale and other Minnesota shippers, MnShp asserts that operations can be expected in 1981 to yield net revenues. MnShp recognizes that opportunity costs, whether as computed by applicant or as computed by its own consultant, would render this a deficit operation, but it takes the position that opportunity costs may not be used to make an otherwise profitable operation appear to be unprofitable. Abandonment of this segment, on the other hand, can be expected to have serious and lasting adverse effects on protestant shippers and on the communities in which they are located, according to MnShp. MnShp alleges that where, as here, protestants oppose abandonment of only a portion of a line of railroad sought to be abandoned, then applicant must show by clear and convincing evidence that the burden imposed on the railroad by continued operation of <u>that</u> portion of the line outweighs the public's need for continued operation of that portion of the line. MnShp insists that CNW has not made such a showing, that CNW, in fact, did not address itself to that issue at all. MnShp argues that no justification has been shown for abandonment of the Sargeant-Dodge segment and that abandonment should not be permitted.

MnShp and NEITA place great emphasis on the financial stability of CNW as reflected in the carrier's 1980 report to its stockholders. In sharp contrast with the instant application, in which applicant describes itself as being in "precarious financial condition" and having a working capital deficit in mid-1980 of more than $71 million, its report to its stockholders claims achievement of "record earnings" and a net income for 1980 of more than $39 million. The record shows,

also, that CNW's net income for the first quarter of 1981, as reported to the stockholders, was $11.8 million. As MEITA put it, "This rail line has been a money maker in the past--its bridge traffic has helped add to the 'record profits' enjoyed by the North Western during 1980--and has helped the President of the North Western to honestly say 'the marginality of our system is a thing of the past'."

All of the protestants join in alleging that applicant has failed to discharge its burden of proof to show that the public convenience and necessity permit the abandonment as proposed.

Applicant, on the other hand, alleges on brief that it has met its burden of proof, that the evidence shows that present and future operations on the Line impose an undue burden on applicant and on interstate commerce, and that this burden far outweighs any adverse effect on users or on the communities served by the Line. With regard to its financial condition, CNW points out that its annual report to the Commission, prepared in conformity with the Commission's accounting regulations, shows a net income deficit for 1980 in excess of $2.4 million, and that in Ex Parte No. 353, Adequacy of Railroad Revenue, 362 I.C.C. 198 (decided December 6, 1979), the Commission found CNW's return on investment of 1.54 percent to be reflective of the continuing financial weakness of CNW and to be inadequate to support a sound financial condition. In its marginal financial condition, CNW asserts, it must take all necessary steps to curb its losses and to use its limited resources on its more productive lines. Abandonment of this Line, it contends, will avoid recurring operating losses and free valuable resources for use elsewhere on the system or to generate revenue through sale of these assets. CNW states that the Commission has supported the elimination of low density branch lines as a means by which carriers can achieve financial stability, and that in view of the present "crisis state of the Midwest railroads" it is imperative that CNW redirect its limited resources to providing essential rail service.

Applicant insists that in operating the Line it has incurred avoidable losses in the amounts previously described, and that, taking into consideration opportunity costs, its total avoidable losses on the Line were $1,568,506 in 1978, $1,542,880 in 1979, and $854,758 during the first 7 months of 1980, calculated as set forth in Appendix B. In the latter regard, applicant states that it has calculated opportunity costs using methodology approved by the Commission, and it points out that the Commission has recognized that opportunity costs are real economic costs experienced by railroads when they forego more profitable use of their resources, and that such costs can be a significant factor in determining whether a particular line at issue is imposing a burden on interstate commerce. Applicant also points out that maintenance on the Line has been minimal, consistent with safety of operations, in an effort to economize and to allocate its limited funds to more productive lines. Applicant notes that just to maintain the Line in the future at minimal Class I FRA standards will entail annual expenditures of $741,585, and it contends that it would be an improvident use of funds to make such expenditures on a line that cannot pay its own operating costs. As seen, applicant's calculations totally exclude consideration of overhead traffic, consistent with its corporate decision that overhead traffic will no longer be routed over the Line. The routing of overhead traffic, applicant insists, is completely a matter of managerial discretion, and applicant contends that the Commission has long recognized that it is the carrier's prerogative to use its facilities in the most efficient and least costly manner consistent with its public obligations. In today's world of spiraling material, fuel and labor costs, according to applicant, the ability of management to rationalize the CNW system has been a key to the survival of CNW.

Applicant is critical of IDOT's evidence, stressing that even by IDOT's computations the Line fails to yield net revenues when consideration is given to opportunity costs and that only by exclusion of opportunity costs would the Oelwein-New Hampton segment show net revenues, but only on the basis of costs of capital and net liquidation value not computed in accordance with the Commission's regulations. Applicant acknowledges that it has not considered the imposition of surcharges as provided under the Staggers Act, but notes that IDOT made no study to determine whether surcharges would only further erode traffic on the Line or whether such charges would be acceptable to the shippers. Primarily, applicant is critical of IDOT's benefit/cost ratio, calling it questionable because it is based on overstatements of shipper benefits and understatements of costs. Insofar as benefits are concerned, according to applicant, the ratio ignored the beneficial impacts of an abandonment, such as increased jobs in trucking, and considered increased expenditures on public roads as an impact caused by abandonment, regardless of reasons for poor maintenance of the roads in the past. Insofar as costs are concerned, the ratio considered only the incremental costs of upgrading and maintaining the Line at FRA Class II standards, completely ignoring the railroad's costs of operations. Further, according to applicant, the benefit/cost ratio is based on gross errors in calculating a rate of return for CNW and in reducing CNW's net liquidation value.

Applicant is equally critical of the Minnesota protestants. Here again, applicant points out, even the "best case" put forth by MnShp fails to establish that the Line or the Sargeant-Dodge segment of the Line will yield net revenues when all pertinent costs are considered. Applicant contends, moreover, that MnShp's consultant relied on inflated traffic projections, on expenses that would have no bearing on future operations, on significantly understated maintenance costs, and on unverified data relating to crew costs in reaching his conclusions. Applicant points out, for example, that the consultant admitted that he didn't know how much it would cost to maintain the 19.2-mile segment, yet he prorated maintenance costs for 19.2 miles and apportioned the expense on the basis of protestant shippers' gross tonnages to reach a maintenance-of-way expense of only $279 per mile even though, if Sargeant-Dodge is the only segment retained, protestants' traffic would have to pay the entire maintenance expense and not just an apportionment based on tonnage.

Applicant is most critical of shipper traffic projections, stressing that while many testified that they would have shipped more cars if the railroad had supplied cars, few were able to state that they had actually ordered such cars, and that actual historic traffic data does not support their optimistic projections. Applicant contends that, to the contrary, traffic moving on the Line has plummeted in recent years with no apparent prospect for a turnaround. Grain shippers, it asserts, are turning to truck and barge, and fertilizer retailers are increasing their truck usage. Applicant concedes that some shippers will experience increases in costs as a result of the abandonment, but maintains that the Commission will not deny an abandonment application merely to preserve a shipper's competitive edge by holding down its transportation costs. One of the major shippers on the Line, Sara Lee, can avoid all cost increases, according to applicant, by a simple, one-time modest expenditure to buy the 4,400 feet of CNW track necessary to connect with the line of the Milwaukee, a line that applicant contends will be a part of Milwaukee's basic core structure after that railroad is reorganized, and another major shipper, Power Span, which chose to locate on the Line with full awareness of its imminent abandonment, can subsidize the Sargeant-Dodge segment in concert with other affected shippers to retain service. On its part, applicant sees no end to exhorbitant losses on the Line, and alleges that it is in the interest of the general shipping public that CNW be permitted to rid its system of this excess line by abandonment.

Applicant points out, finally, that no shippers appeared in opposition to abandonment of the approximately 40 miles of line between Dodge Center and Randolph, or the approximately 25 miles of line between McIntire and Sargeant, and surmises that to shippers and receivers located thereon the abandonment is of little interest.

GENERAL DISCUSSION AND CONCLUSIONS

Applicant may abandon this Line, under the statute, only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment, in whole or in part. This requirement that a proposed rail abandonment meet the test of public convenience and necessity has not been changed in some 60 years, and since the early 1920's the decisions of the Commission in rail abandonment proceedings have reflected its view that rail abandonments are part and parcel of the national transportation policy established by the congress. Currently, and as here pertinent and set forth at section 10101a of the act, that policy is to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, to ensure the development and continuation of a sound rail transportation system to meet the needs of the public and the national defense, and to foster sound economic conditions in transportation and ensure effective competition and coordination between rail carriers and other modes. As it was early stated by the Supreme Court, the Commission in administering the statute must protect interstate commerce from onerous burdens which may affect the ability of rail carriers to discharge efficiently their transportation duties to the public, and at the same time protect the public and involved communities from undue injuries that may result from a rail abandonment. Colorado v. United States, 271 U.S. 153 (1926). A balancing is required, a weighing of the benefits accruing to local interests from continued operation of the line proposed to be abandoned against the burden which continued operation would impose on the carrier and on interstate commerce. Before an abandonment may be authorized it must appear that continued operation of the line imposes upon the railroad and on interstate commerce a burden of sufficient magnitude as to outweigh any and all injuries to local interests that may result if the ine is abandoned. The burden of proof in this respect is upon the applicant. Abandonment of Branch by Pere Marquette, 72 I.C.C. 303 (1922). There is today, also, the additional element that congress has written into the act, that in making its finding as to public convenience and necessity the Commission must consider whether the abandonment will have a serious, adverse impact on rural and community development, 49 U.S.C. section 10903(a).

Considering first the burden imposed on the railroad and on commerce by continued operation of the Line, the evidence is convincing that during 1978, 1979, and the first 7 months of 1980, at least, operations on the Line have been far from a financial drain on applicant or a burden on commerce. To the contrary, the Line yielded substantial net revenues. As computed by applicant, overhead revenues on the Line in 1978 exceeded line-haul expenses (based on replacement costs) by more than $2.5 million and by more than $2.8 million if historical costs are used, and applicant concedes that net overhead revenues would be "somewhere in between" those two figures. Applying the average of those net overhead revenues to applicant's cost and revenue data as shown in Appendix B, applicant's avoidable loss from operations in 1978, $326,850, was actually a net revenue of more than $2.4 million. Similarly, in 1979 and the first 7 months of 1980, applicant had net revenues, on this basis, of more than $3 million and $2.1 million, respectively. Making allowance for opportunity costs as computed by applicant does not alter the fact that operations on the Line during these periods yielded net revenues. In the latter regard, opportunity cost has been defined as the economic loss experienced by a carrier when it foregoes some other, more profitable use of its resources, such as a branch line, i.e., an investment, such as is

represented by a branch line, which brings a return to a carrier that is less than the cost of capital represents an opportunity cost. Texas and Pacific Railway Company Abandonment, 363 I.C.C. 666 (1980). The Commission in recent years has considered opportunity cost as a factor, one of many, in fact, in its determinations of whether public convenience and necessity permit the abandonment of rail lines in particular cases. See Texas and Pacific, supra, and the decision of the Seventh Circuit in Farmland Industries, Inc. v. United States and Interstate Commerce Commission (No. 80,1308, decided March 3, 1981). In this proceeding, as in others, opportunity costs must be weighed in the balance to determine whether there is undue burden on the carrier and on commerce.

As indicated, applicant calculated opportunity costs by multiplying the sum of its avoidable loss, working capital, and net liquidation value by its cost of capital, in this case the same 9.3 percent developed in Texas and Pacific, supra, as the appropriate, inflation-adjusted cost of capital rate for determination of opportunity costs and the most recent assessment by the Commission of the railroad industry's cost of capital. For the base year this resulted in an opportunity cost of $1,227,494. This sum was then added to avoidable loss from operations to arrive at total avoidable loss. This methodology is erroneous because it results in double counting of avoidable loss by first using avoidable loss in the base and then adding it back into the opportunity cost. Also, to follow the precedent established in Texas and Pacific, supra, working capital as well as avoidable loss should be eliminated from the base, and opportunity cost should be calculated as the result of net liquidation value multiplied by the cost of capital, 9.3 percent. For this calculation it is first necessary to review applicant's computation of net liquidation value of $12,985,885. A significant factor in that computation, more than $8 million, is attributed to the value of reusable rail and track material. These items were valued at from 50 percent to 75 percent of new, which resulted in unusually high prices for relay rail and other track material, valuations beyond a zone of reasonableness and which presume an equal demand for 90-pound rail as for the more widely used 115-pound rail. Because of the general obsolescence of lighter weight rail, the diminished manufacturing capacity for this size stock may cause it to become scarce and to command higher prices than the more standard rail. In contrast to CNW's theoretical approach to this pricing, IDOT's engineering witness, Johnson, went to the marketplace and established practical valuations which are more reasonable and acceptable. Applying Johnson's valuations to this material, as previously described, reduces the net liquidiation value by $2,059,100 to a total of $10,926,785. The product of that sum multiplied by 9.3 percent is an opportunity cost for the base year of $1,016,191. Appendix F hereto is a restatement of the revenue and cost data shown in Appendix B for the base year and estimated subsidy year, incorporating the corrections above discussed, and also a subsidy rate of return of 12.1 percent. As noted, CNW used 16.979 percent as its cost of capital for road property, calculated as previously described. While the methodology employed by applicant may have some merit, it is not well substantiated. The net income figures used are not supported and do not correspond to the figures provided in the carrier's income statements, and CNW did not weight its cost of capital by the proportion of debt and equity comprising its capital structure. A more appropriate cost of capital would be the carrier's current after-tax cost of capital as found by the Commission in Adequacy of Railroad Revenue, 364 I.C.C. 311 (1980). There, the Commission found a composite cost of capital, 11.22 percent, which was predicated upon an embedded cost of railroad debt, 7.8 percent, and a cost of equity capital, 13.5 percent. The current cost of railroad debt was found to be 10 percent. By substituting the current cost of debt for the embedded rate, the current cost of capital becomes 12.1 percent, and this is the appropriate return element to use for subsidy calculations as required by 49 CFR 1121.45(a), which provides that the current cost

of capital should be used. This is in keeping, also, with the findings of the Commission in Ex Parte No. 393, Standards for Railroad Revenue Adequacy (served March 30, 1981), to the effect that the adequacy of the railroads' rate of return should be measured by their current cost of capital. As seen, applicant is not in a tax paying posture, and thus its after-tax cost of capital may be considered to be the same as its pre-tax cost, 12.1 percent.

Base year operations as depicted in Appendix F show positive results, that is, a net revenue return based on actual, historical data. It is the essence of applicant's case, however, that the great volume of overhead revenues reflected in this data must be ignored because applicant, as a matter of managerial discretion, has determined that overhead traffic will no longer move on this Line. There is ample precedent for the proposition advanced by applicant that the routing of overhead traffic and the selection of alternate routes for the handling of such traffic is a matter of managerial discretion. See Baltimore & Ohio R. Co. Abandonment, 354 I.C.C. 240 (1978) and Southern Pacific Transp. Co.--Abandonment, 360 I.C.C. 138 (1979). Protestants' basic argument in Baltimore & Ohio, supra, as here, was that applicant had failed to prove that the line proposed to be abandoned was operating at a loss. The evidence there showed that operating losses would have been incurred if overhead movements were not considered. In approving the abandonment, the Commission noted that it has long recognized that, while revenues derived from overhead traffic are a factor in determining a line's earning capacity, in the final analysis it is the revenues produced by traffic originating and terminating on a line, and the expenses incident to such traffic, that is the principal criteria in determining whether there exists a real need for the continued operation of the line. The Commission stressed that carriers should be free to use their facilities in such a manner as they deem necessary for the promotion of economy and efficiency, and that local shippers who are unable to support a railroad line cannot demand continued rail transportation simply because the line is used for the movement of overhead traffic, traffic which could be handled as expeditiously over other routes. More recently, in No. AB-7 (Sub-No. 76), Chicago, Milwaukee St. P. & P. R. Co., Abandonment, decided December 3, 1979 (not printed), division 2 of the Commission stated that so long as shippers can route overhead traffic over similar routes, the contribution of overhead traffic moving over a line proposed to be abandoned will not be considered. In the instant proceeding, as seen, applicant has shown that it has various, adequate alternatives for routing its overhead traffic now or formerly moving on this Line, and that a management decision has been made to divert from the Line all remaining overhead traffic. Applicant's officials freely acknowledged that this decision was made in contemplation of this abandonment, pointing out that the shifting of overhead traffic away from the Line is a step in the overall rationalization of its entire system for reasons of economy and efficiency. Thus, while on its face, applicant has by corporate decree rendered a profitable line unprofitable, the move is, in a larger sense, in accord with overwhelming Commission precedent.

Much was made, as stated, by protestants regarding the glowing financial reports made by CNW to its stockholders in contrast to the "precarious" financial condition reported to the Commission. As required under the Commission's Uniform System of Accounts, Class I railroads report to the Commission under the so-called betterment accounting method4/ under which expenditures for the like replacement of track structures are immediately expensed, rather than capitalized

4/ In a proposed rulemaking proceeding, No. 36988, Alternative Methods of Accounting for Railroad Track Structures, decided June 10, 1981, the Commission is now considering a change in its method of accounting for track structure from betterment to depreciation accounting.

and expensed over the useful life of the track as with depreciation accounting. To its stockholders, on the other hand, CNW and many other carriers report on the depreciation accounting method. Under the latter method reported expenses are much lower and net income, as a result, is higher. Conversely, reported expense is much greater under betterment accounting and net income is lower. Under either method, however, the railroad has actually spent the same amount of money on track structures in any given year, the result just looks different depending on the accounting method used. Analysis of all pertinent financial data of CNW strongly indicates that, although its prospects have brightened recently, CNW is in marginal financial condition. It is well established, in any event, that every branch line must pay its own way, regardless of whether the carrier's system as a whole is profitable or unprofitable, and that unprofitable and unnecessary branch line operations are a drain upon the carrier and a burden upon interstate commerce. See New York Central R. Co. Abandonment, 254 I.C.C. 745 (1944).

Protestants also allege, as seen, that the financial results of operations on the Line were influenced by a policy on the part of CNW to downgrade the service on the Line. Downgrading results when a carrier curtails service on a line in order to suffocate a viable transportation agency. It does not constitute downgrading, on the other hand, when a carrier defers the expenditure of funds for maintenance and services to conform with reasonable priorities for the expenditure of limited funds. Where the intent is to preserve for as long as possible a marginal service in the face of the necessity to rationalize a rail system and weed out non-productive services, this is a reasonable act of economy and not downgrading. The testimony of the shipper witnesses amply demonstrates that service on the Line has not been all that it could or should be, and strongly suggests that much traffic was lost on this account. The record will not support a finding, however, that applicant has engaged in a deliberate and calculated effort to downgrade this Line for the purposes of this abandonment proceeding. Compare Missouri-Kansas-Texas R. Co. Abandonment, Okla., 338 I.C.C. 728 (1971).

The evidence of record is persuasive that, with declining usage of the Line by shippers and receivers located thereon, continued operation of the Line will impose a burden on applicant and on interstate commerce. Applicant has shown, moreover, that it is likely to retain on other lines the overhead traffic now moving on the Line, and that there is need elsewhere in its system for reusable track and other materials in the Line or that these assets may be liquidated to provide needed cash to CNW. This burden, as noted, must be balanced against the burden that will be imposed by an abandonment on the users and on the general public. In addition, there must be specifically considered whether this abandonment will have serious, adverse impact on rural and community development.

Considering first the impact on rural and community development, it is not apparent on this record that the impact will be serious. The involved shippers herein are in many instances major businesses in the several small communities on the Line and there are affected shippers and receivers in the rural areas that surround the Line, but the evidence does not establish that the proposed abandonment, which will adversely affect many of these shippers and recivers, will have serious, adverse impact on rural or community development. The community of Hayfield, for example, which opposed this abandonment, has been able to attract new businesses despite the specter of imminent rail abandonment, and several of its leading employers as well as other businesses do not require rail service. There is no indication that the effect on other communities will be more serious or that rural areas will be adversely impacted to any greater extent. At most there will be some hampering effect on economic growth and development

immediately following the abandonment in some instances, and some increase in congestion and wear on local highways. But this will likely be offset in the long run by the benefits of increased motor carrier services that usually are attracted to fill the void.

More serious adverse impact may be expected on many of the shippers and receivers in the area. As previously described, expensive adjustments will have to be made in their facilities to permit increased motor carrier use in lieu of rail, and as a result of the changeover many will have substantial recurring expenses. As described in Appendices D and E hereto, many will have to alter their shipping practices, shift their sources of supply or markets, or give serious consideration to relocation of their business, and others may be caught in a price squeeze between their customers and their competition. The effect, while serious, does not appear to be catastrophic. Some of these shippers and receivers have the remedy within their grasp, but have some hard decisions to make. Sara Lee, for example, has the option, for a moderate cost, to purchase its connection to the Milwaukee Railroad. For others, Power Span for example, the solution is not that simple. But all will have adjustments to make, because the inevitable result of almost every rail abandonment includes inconvenience and disruptions, and in many instances increased transportation costs. It is well established, on the other hand, that a railroad cannot be expected to operate a line of railroad at a deficit merely to benefit its users or to continue to perform operations because shippers on the line may have invested in facilities or improvement in the expectation of continued rail service. See Chicago, M. St. P. & P. R. Co. Abandonment, 312 I.C.C. 667 (1961). Where the foreseeable adverse impacts of abandonment are outweighed by the requirements of interstate commerce as a whole, the abandonment of a particular rail line is justified and should be approved and authorized. Chicago and North Western Transp. Co.--Abandonment, 348 I.C.C. 708 (1976), and St. Louis-S. F. Ry. Co. Abandonment, 328 I.C.C. 34 (1965).

The evidence of record herein is not convincing that there is enough traffic originating and terminating on this Line to support continued operations on the Line. As previously discussed, many projections were made as to the volumes of traffic that would be tendered to CNW on the Line if operations are continued. Only time would tell whether these projections would ever materialize into actual revenue-producing traffic, time that would be paid for by CNW in continuing deficits from originating and terminating traffic on the Line. These projections leave unanswered the question of where was this traffic last year or the year before. If, as indicated by some protestants, this traffic did not materialize because the railroad failed to furnish cars to move this traffic, the evidence shows that shippers on the Line fared as well if not better than other shippers on applicant's system in the matter of car supply, and there is nothing in this record to show that, given this carrier's financial condition, car supply in the future would be any better. It is not unusual in rail abandonment proceedings for shippers to project traffic potentials that far exceed past or present traffic patterns. The Commission has often stated, on the other hand, that absent a contrary showing by protestants, it will be presumed that past and present levels of traffic on a line will continue into the future. See Chicago and North Western Transp. Co.--Abandonment, 360 I.C.C. 647 (1980). If present traffic levels on the Line are attributable to poor service, as alleged by many protestants, the evidence is equally clear that to the extent that CNW's service was slow, unreliable, or otherwise unsatisfactory to the shippers the root cause of such service shortcomings was and is the deteriorated condition of the Line, a condition that will not go away without the expenditure of substantial sums of money. Increased expenditures to rehabilitate and maintain the Line would in turn require further increases in revenues to support the

Line. There is no probative evidence in this record that such levels of revenue can be attained on this Line. As earlier stated, several alternate proposals for partial abandonment were offered by protestants. None of these proposals were drawn with sufficient detail to permit comprehensive analysis as to profitability, and each relied upon traffic projections made by the shippers. Based upon actual traffic and revenue data of record, none of these alternate proposals gave promise of sufficient revenues to overcome all pertinent expenses, including opportunity costs, so as to produce net revenues. Contrary to the position taken by protestants, the burden of proving the viability of suggested alternatives to abandonment, such as partial abandonment, is upon protestants. State of Me. Dept. of Transp. v. I.C.C., 587 F2d 541 (1978) and Village of Candor v. United States, 151 F. Supp. 889 (1957). Protestants have failed to sustain that burden.

Perhaps the weakest link in applicant's case is its failure to adequately identify alternate transportation services available to offset abandonment of the Line. As noted, its direct evidence in this regard was stricken as unreliable. However, numerous available motor carriers were identified by knowledgeable shipper witnesses on cross-examination, and the record clearly shows that almost every shipper and receiver testifying herein is being served to an increasing extent by motor carriers operating in the area. The fact of the matter is that today, more than ever before, the motor carrier industry is providing service where a need for service is shown, because today, given the present state of motor carrier deregulation, almost no barrier is interposed by regulation to motor carriers initiating needed transportation services. The moving philosophy in regulation now is that marketplace factors and competition dictate the need for motor carrier services, and if abandonment of this Line creates a greater need for motor carrier services such carriers will appear to fill the void. The record as a whole is persuasive that adequate motor carrier, barge and rail transportation services will be available after abandonment of the Line to serve the shippers and receivers in the affected areas.

All the evidence of record considered, the conclusion is warranted that the present and future public convenience and necessity permit the abandonment of the Oelwein-Randolph Line as sought. This conclusion will seem harsh and insensitive to many shippers and receivers, (and it is,) but it accords with the statute as it is interpreted in Commission precedent and reflects the intent of congress that essential railroad systems must be preserved. A word of caution to the railroad, however. Although the proposed abandonment has been justified under the statute, authority granted by the Commission to abandon a line of railroad is permissive only. It is the railroad that must take the final step. Once a line of railroad is abandoned it is probably gone forever, and it would be well for the applicant, in its own interest, before giving effect to the authority hereinafter granted, since it has had the opportunity now to more fully gauge the deep interest of its users in continued operation of the Line, to re-examine its options and the decisions made which brought this matter to its present posture.

The environmental and energy impacts of this proposed abandonment have been examined, including considerations of air, water and noise pollution, public safety, and energy consumption. The record supports the findings in the environmental assessment that this abandonment will not cause any significant adverse energy consumption or environmental impacts. However, because the right-of-way traversed by the Line may be suitable for recreational or other public use, a public use condition will be imposed which will prohibit the sale or removal of the rail property for a period of 120 days.

Premises considered, The Administrative Law Judge finds that the present and future public convenience and necessity permit the abandonment by The Chicago and North Western Transportation Company of its

line of railroad, 144.8 miles between Oelwein and Randolph as hereinbefore described, subject to conditions for the protection of railroad employees as set forth in Oregon Short Line R. Co.--Abandonment, Goshen, 360 I.C.C. 91 (1979), and subject to the further condition that The Chicago and North Western Transportation Company shall keep intact all of the right-of-way, track, bridges, and drainage culverts on the Line for a period of 120 days from the date of service of this decision to permit any State or local governmental agency or other interested persons to negotiate the acquisition for public use of all or any portion of the Line. The Judge further finds that this action does not significantly affect the quality of the human environment or the conservation of energy resources.

It is Ordered:

1. The findings in this decision shall be published in the Federal Register concurrently with the service of this decision. Offers by any person or government entity for financial assistance or purchase of the line, to enable service to be continued, must be tendered to the carrier within 10 days following publication of this notice. The offer must also be filed concurrently with the Commission, and comply with requirements of 49 CFR 1121.38 (see 49 USC 10901, as amended by section 402(c) of the Staggers Rail Act of 1980). After receiving appropriate notice that an offer of financial assistance is being considered, CNW shall comply with the information requirements in 49 CFR 1121.38(f) and 49 USC 10905(c) as amended by section 402(c) of the Staggers Rail Act of 1980.

2. All correspondence to the Commission containing offers of financial assistance for continued operation or acquisition of the line shall contain an appropriate reference to this proceeding. The following notation shall be typed in boldface in correspondence: Section of Finance, AB-RSCP.

3. Subject to the conditions set forth above, an appropriate certificate of abandonment shall be issued. CNW shall not effect abandonment prior to the effective date of the certificate of abandonment.

4. This decision shall be effective 30 days from the date it is served.

5. If the authority granted by this decision is not exercised within one year from the effective date it shall be of no further force and effect.

By the Commission, Paul J. Clerman, Administrative Law Judge.

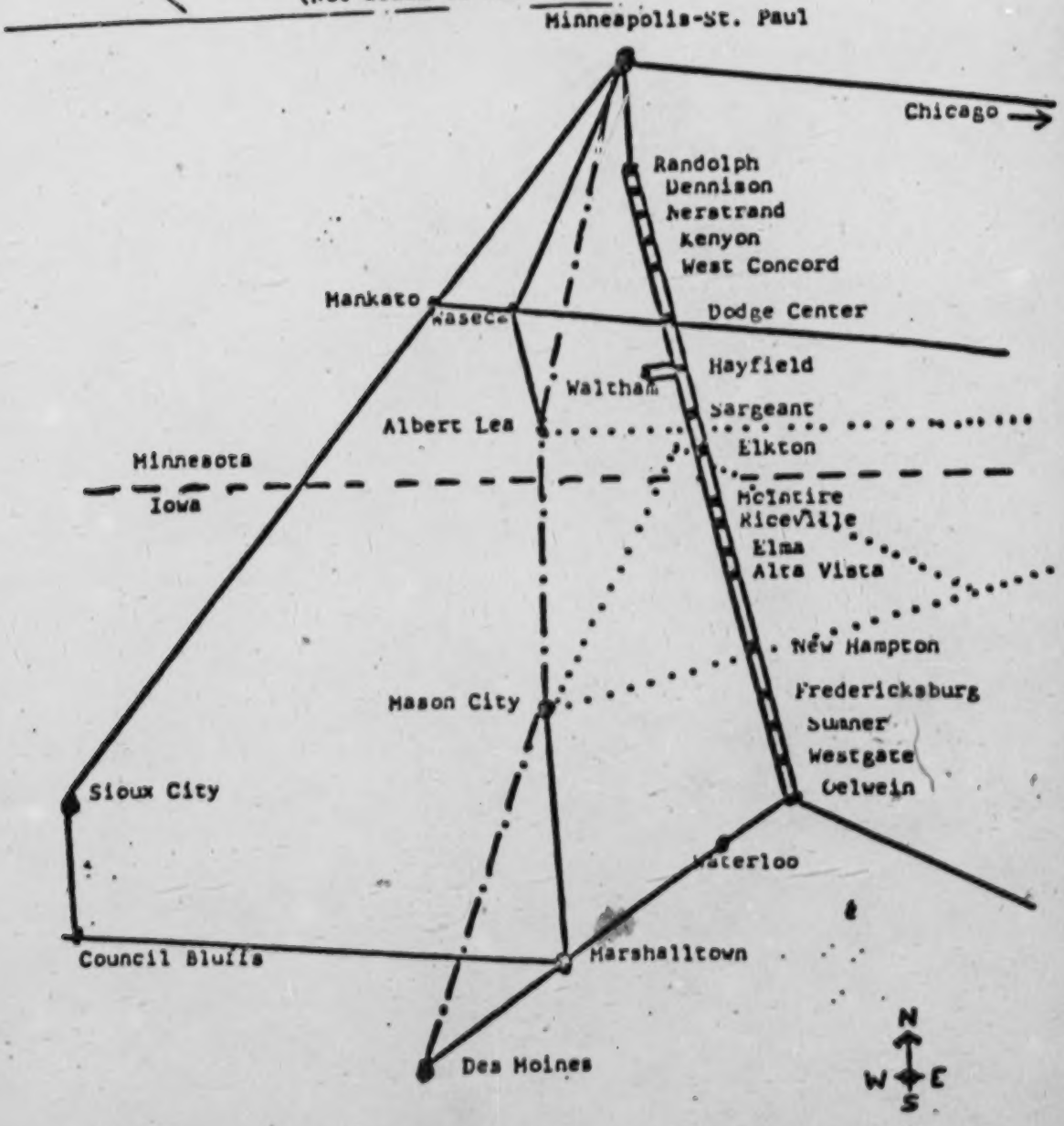
AGATHA L. MERGENOVICH

Secretary

(SEAL)

APPENDIX A

Straight-line Map of Proposed Abandonment
(Not drawn to scale)



APPENDIX B

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY
OELWEIN, IOWA TO RANDOLPH, MINNESOTA
Revenue And Cost Data
For The Years 1978, 1979, Seven Months Ended July 31, 1980, The Base Year And The Estimated Subsidy Year

	1978	1979	Seven Mos. Ended July 31, 1980	Base Year (Note 1)	Estimated Subsidy Year (Note 2)
REVENUES ATTRIBUTABLE FOR					
1. Freight Orig. and/or Term. on Branch	$1,265,820	$1,363,161	$ 794,899	$1,420,566	$ 1,623,115
2. Bridge Traffic	-	-	-	-	-
3. All Other Revenue and Income	49,151	46,020	12,843	28,242	29,654
4. Total Revenues Attributable (lines 1 thru 3)	$1,314,971	$1,409,181	$ 807,742	$1,448,808	$ 1,652,769
AVOIDABLE COSTS FOR					
5. On-Branch Costs (lines 5a thru 5j)					
a. Maintenance of Way and Structures	$ 402,398	$ 437,413	$ 301,107	$ 468,041	$ 741,383
b. Maintenance of Equipment	43,254	41,525	22,599	38,681	42,092
c. Transportation	309,168	304,869	168,276	288,414	306,581
d. General Administrative	-	-	-	-	-
e. Deadheading, Taxi and Hotel	3,131	2,800	1,494	2,634	2,787
f. Overhead Movement	-	-	-	-	-
g. Freight Car Costs	140,490	146,422	60,637	117,089	133,784
h. Return on Investment - Locomotives	40,365	47,920	25,238	42,995	48,125
i. Revenue Taxes	14,114	-	-	-	-
j. Property Taxes	-	-	-	-	-
	$ 952,920	$ 981,009	$ 580,161	$ 957,854	$ 1,274,952
6. Off-Branch Costs (lines 6a and 6b)					
a. Freight orig. and/or term. on branch	$ 688,881	$ 711,406	$ 362,872	$ 665,200	$ 760,048
b. Bridge Traffic	-	-	-	-	-
	$ 688,881	$ 711,406	$ 362,872	$ 665,200	$ 760,048
7. Total Avoidable Costs (lines 5 plus line 6)	$1,641,821	$1,712,415	$ 943,233	$1,623,054	$ 2,034,000
AVOIDABLE LOSS					
8. a. Avoidable Loss from Operations (line 4 minus line 7)	$ 326,850	$ 303,234	$ 135,491	$ 174,266	$ 383,231
b. Opportunity Costs	1,261,656	1,239,646	719,267	1,227,494	-
c. Total Avoidable Loss (lines 8a thru 8b)	$1,588,506	$1,542,880	$ 854,758	$1,401,760	$ 383,231
REHABILITATION COSTS FOR					
9. Rehabilitation	$ -	$ -	$ -	$ -	$ -
10. Administrative Costs (Subsidy Year Only)	-	-	-	-	16,528
11. Casualty Reserve Account (Note 3)	-	-	-	-	-
12. Total Subsidization Costs (lines 9 thru 11)	$ -	$ -	$ -	$ -	$ 16,528
RETURN ON VALUE FOR					
13. Valuation of Property (lines 13a thru 13c)	$ -	$ -	$ -	$ -	$ 31,687
a. Working Capital	-	-	-	-	12,985,889
b. Income Tax Benefits	-	-	-	-	13,017,576
c. Net Liquidation Value	-	-	-	-	16,070
	- %	- %	- %	- %	
14. Rate of Return	$ -	$ -	$ -	$ -	$ 2,213,649
15. Total Return on Value (line 13 times line 14)					
ESTIMATED SUBSIDY					
16. Estimated Subsidy (line 4 minus 7, 12 and 15)	$ -	$ -	$ -	$ -	$ 2,613,408

NOTES: 1. Base Year data reflects actual operations for the twelve months ended July 31, 1980.
2. Estimated Subsidy Year ended July 31, 1981 reflects the same train operations as the base year.
3. The rehabilitor shall be required to obtain insurance for an amount equal to CNTV's uninsured liability ($2,500,000) holding the CNTV harmless from any loss, damage, destruction, injury or death resultant from operations of this line, and must pay its proportionate share of the CNTV's system insurance costs.

APPENDIX C

OELWEIN, IOWA TO RANDOLPH, MINNESOTA
INCLUDING HAYFIELD TO WALTHAM, MINNESOTA

ESTIMATED LIQUIDATION VALUE

Main Track	144.8 Miles
Other Track	24.8 Miles
Total All Tracks	169.6 Miles

Land					
2,107.48	Acres which possibly can be sold to various persons at an estimated total value of $1,742,000				$(1,742,000)
Bridges, Trestles and Culverts					
Bridge timber, usable	53.322 MBM	@	$ 365.00	$(19,463)	
Bridge steel, usable	264.2 NT	@	632.20	(167,027)	
Bridge steel, scrap	219.0 NT	@	77.82	(17,043)	
					(203,533)
Ties					
Cross ties, usable	222,100 Ea.	@	5.04	(1,119,384)	
Switch ties, usable	143.604 MBM	@	224.38	(32,222)	
					(1,151,606)
Rail					
115# Usable	14,887.172 NT	@	312.90	(4,658,196)	
112# "	944.029 NT	@	312.90	(295,387)	
100# "	480.983 NT	@	312.90	(150,500)	
90# "	10,246.020 NT	@	312.90	(3,205,980)	
112# Scrap	9.539 NT	@	79.64	(760)	
100# "	9.817 NT	@	79.64	(782)	
90# "	1,138.455 NT	@	79.64	(90,667)	
85# "	1,331.256 NT	@	79.64	(106,021)	
75# "	838.941 NT	@	79.64	(66,763)	
60# "	82.780 NT	@	79.64	(6,593)	
					(8,581,649)
Other Track Material					
Crossing Diamonds, usable	2 Ea.	@	15,000.00	(30,000)	
	#12-115# 1 TO	@	9,216.37	(9,216)	
Turnouts complete, usable	#12-90# 1 TO	@	6,956.69	(6,957)	
	#10-115# 13 TO	@	7,817.74	(101,631)	
	#10-90# 3 TO	@	5,899.75	(17,699)	
	#9-90# 1 TO	@	4,963.53	(4,964)	
	#8-90# 10 TO	@	4,001.86	(40,019)	
	#8-85# 1 TO	@	3,797.20	(3,797)	

OELWEIN, IOWA TO RANDOLPH, MINNESOTA
INCLUDING HAYFIELD TO WALTHAM, MINNESOTA

ESTIMATED LIQUIDATION VALUE - CONTINUED

Other Track Material (continued)					
Switches, frogs, guard rails switch lamps and switch stands					
Scrap	151.660	NT @	$ 64.18	$(9,734)	
Tie plates (Gross less 10% estimated loss)					
Usable	125,905.18	Cwt.@	18.82	(2,369,535)	
Scrap	368.991	NT @	91.67	(33,825)	
Joint bars (Gross less 10% estimated loss)					
Usable	19,000.75	Cwt.@	26.25	(498,770)	
Scrap	627.519	NT @	91.67	(57,525)	
bolts, nutlocks & spikes, etc. (Gross less 25% estimated loss)					
Scrap	1,129.216	NT @	91.67	(103,515)	
					$(3,287,187)
Signals					(115,500)
Communications					
Copper Wire	13,566	lbs.@	0.76	(10,310)	
Hot Box Detector	1	Ea. @	12,000	(12,000)	
					(22,310)
Buildings					(7,500)

OELWEIN, IOWA TO RANDOLPH, MINNESOTA
INCLUDING HAYFIELD TO WALTHAM, MINNESOTA

ESTIMATED LIQUIDATION VALUE - CONTINUED

TOTAL ESTIMATED GROSS LIQUIDATION VALUE	$(15,111,285)

Estimated cost of labor and material recovering and dismantling property	
Bridges	$ 25R,000
Track	1,470,400
Restoring street and highway crossings	225,000
Land disposal	3,000
Signals	153,800
Communications	11,300
Buildings	3,900

TOTAL ESTIMATED COST OF LABOR AND MATERIAL RECOVERING PROPERTY	$ 2,125,400
TOTAL ESTIMATED NET LIQUIDATION VALUE	$(12,985,885)

MBM - 1,000 board measure
NT - Net ton of 2,000 pounds
Ea. - Each
TO - Turnout
Cwt. - Hundredweight
Lbs. - Pounds

APPENDIX D

PROTESTANT IOWA SHIPPERS

First Miss, a manufacturer of fertilizer and farm chemicals at Sumner, distributes its products to about 100 farmers within a 10-mile radius of Sumner. It is here concerned with its inbound traffic of chemicals and fertilizer ingredients. Liquid products inbound move primarily by truck, but dry products, about 60 percent of its traffic, move by rail. Inbound rail traffic in 1980 was 36 cars, 3,553 tons, consisting of 24 cars of potash, 10 cars of diammonium phosphate, and one car each of anhydrous ammonia and urea. In 1979 First Miss received 30 cars and in 1978 45 cars. Because of cost considerations it desires to receive all of its dry fertilizer by rail. Loss of rail service at Sumner would entail additional costs to First Miss of $6.50 per ton on diammonium phosphate, which would have to be diverted to a facility at Oran, IA and transshipped by truck to Sumner, a distance of 35 miles. Also, trucking of potash from Waterloo, IA, at which point unit trains of potash are received from Canada, would cost First Miss an additional $1.75 per ton over the trucking allowance given by the vendor. If rail service to Sumner is eliminated, First Miss would also have to expend up to $50,000 to modify its facility to accommodate increased truck service. Its storage capacity at Sumner for dry fertilizer is 1,800 tons, but it is increasing its potash storage capacity because of unreliable rail service and to take advantage of lower prices in the off-season. Due to competitive conditions and supervisory problems, First Miss believes that it is impractible to service customers beyond a 10 to 12-mile radius of Sumner.

Thermogas, a producer and distributor of fertilizer, chemicals and propane gas at Sumner, uses rail service to receive basic ingredients for its fertilizer, primarily potash and phosphoric acid. In 1980 Thermogas received 91 cars of potash, 9,100 tons, which it used in the production of 12,000 tons of mixed fertilizer. For its fertilizer operations it needs 7,000 tons or more of potash annually, which comes from sources in Canada and North Carolina. Fertilizer constitutes about 65 percent of its business. It has been increasing its inventories in order to have sufficient product on hand during the fertilizing season. It recently spent about $800,000 to improve its Sumner facility and can now store more than 10,000 tons of dry fertilizer. Thermogas does not find it feasible to service a trade area of more than a 10 to 12-mile radius of Sumner.

Overton, a distributor of chemicals and detergents at Sumner, receives up to 20 percent of its traffic by rail. In 1980 it received 33 cars of chemicals, about 2.8 million pounds. All other inbound traffic and all of its outbound traffic moves by truck. Over the past several years its rail service has declined from five times a week to two times a week. If rail service is discontinued, it will incur the additional expense of short-hauling its shipments by truck from the nearest railhead, or it will consider relocating its business.

Meinerz, a producer of cheese, butter, and dried milk and whey at Fredericksburg, uses rail to ship and receive dry products and to receive fuel oil. In 1980 it shipped 39 cars but received none. In 1979 it shipped 103 cars and received 23 cars. In that year its total shipments aggregated more than 33 million tons, of which almost 8 million tons moved by rail. Its rail usage has declined because service has become unreliable. Several instances of poor service were cited, but there is no allegation that sales were lost because of poor rail service. Meinerz Maintains its own fleet of 40 tractor/trailer units to supplement common carrier service. If rail service is discontinued, Meinerz will lose certain customers who can receive shipments only by rail. For example, during 1979-1980 it sold over $18.6 million of products to the U. S. Government under contracts which require rail delivery. Meinerz also needs rail service to receive a particular type of fuel oil used to operate its plant when natural gas supplies are low. This high viscosity oil must be heated in transit. Meinerz would incur an addditional annual cost of more than $49,000 in moving this oil by truck.

Farmers' Feed & Grain, at Riceville, sells grain, feed, seed, fertilizer and chemicals, stores grain, grinds and mixes livestock feed, and applies fertilizer and chemicals on farm lands. Farmers had gross sales in 1980 of $8.7 million, of which $7 million was derived from grain, $1 million from fertilizer, and $0.5 million from feed. Most of its anhydrous ammonia and liquid fertilizer is moved by truck as is some of its dry fertilizers. Rail is used primarily to ship dry fertilizer to Riceville from sources in Canada, New Mexico, Florida and

the Carolinas, and to ship grain to various points in Iowa, Minnesota and Wisconsin and to Chicago, IL and ports on the Gulf of Mexico. During 1980 Farmers handled some 2 million bushels of grain, 5,000 tons of fertilizer, and 1,500 tons of feed. Of the fertilizer, almost 1,800 tons, or about 36 percent, moved by rail, a total of 19 cars. Outbound, Farmers shipped 363 cars of corn and soybeans. According to its president, it would have shipped an additional 150 cars in 1980 if CNW had supplied the cars, but there was no evidence that these cars were actually ordered. The witness estimated that 500 hopper cars could be used to ship grain in 1981 if cars were made available. During the first four months of 1981 about 76 hopper cars were actually loaded and about 40 boxcars. According to this witness, failure to use more rail cars is attributable to poor service on the part of CNW. Sales of grain are made prior to harvesting and prices include an element to reflect transportation charges. If sales are contracted for rail delivery and rail service is not available when delivery is made, Farmers incurs penalty charges for failure to deliver on time or by rail. According to this witness, also, Farmers would incur additional charges and costs of $12 per ton on potash if abandonment of the Line prevents direct rail transportation of potash from Canada sources. Added trucking cost would be $6 per ton, and another $6 would result from loss of the favorable exchange rate, United States vis-a-vis Canada, if purchases of potash have to be made at United States sources, such as Waterloo, IA. This witness also testified that Farmers and other fertilizer dealers in the area service only a 12-mile radius, that fertilizer application per acre of corn in the area is about 400 tons per year, that on this basis the area adjacent to the Line consumes between 275,000 and 300,000 tons of fertilizer a year, and that, consequently, the almost 70,000 tons of fertilizer handled on the Line in 1979 constituted almost 25 percent of all fertilizer consumed in this market. Farmers contends, also, that available motor carriers in the area authorized and able to transport grain are unable to handle the traffic if the Line is abandoned.

Andersen's, at Alta Vista, sells fertilizer, feeds and grain. Its business is 50 percent grain sales and 30 percent fertilizer. It commenced operations in December 1979 and during 1980 handled 720,000 bushels of grain and 2,500 tons of fertilizer. Its rail traffic in that year consisted of 15 inbound cars of fertilizer and 24 outbound cars of corn. During that year Andersen could have shipped 60 additional cars of grain and ordered at least 40 cars that CNW did not supply. As a result, Andersen incurred some $1,860 in additional interest charges on its grain. In 1981 Andersen estimates that it could load 155 cars of grain to various destinations. If the Line is abandoned, it would have to spend $100,000 to modify its facility to handle all truck transportation and would consider relocating the facility.

C&H is a retailer of general farm supplies at New Hampton. During 1980 C&H received 40 cars containing 4,000 tons of phosphates, potash and urea. Other products move primarily by truck. Its gross sales in 1980 were about $1 million. The railroad's records show that C&H received 13 cars in 1979 and 11 cars in 1978. If the Line is abandoned C&H will have to spend $60,000 to modify its facility to accommodate increased truck transportation.

Custom is a retailer of fertilizers, chemicals and seed at Riceville. Its gross sales were $2 million in 1980. Fertilizer sales constitute about 75 percent of its business. All of its liquid fertilizer and about 10 percent of its dry fertilizer moves by truck. The bulk of its dry fertilizer moves by rail from sources in Canada and Florida. During 1980 Custom received 49 cars of fertilizer. Custom competes with dealers who have rail service on another railroad, and expects to be at a competitive disadvanage if this Line is abandoned.

Farm-Coop is a dealer in fertilizer and grain, among other products, at Fredericksburg. Grain and fertilizer constitute about 70 percent of its business. During 1980 Farm-Coop handled 2.8 million bushels of grain and 9,000 tons of fertilizer. About 5,000 tons of fertilizer, 50 cars, were received by rail. However, of its grain only about 81,000 bushels moved by rail. Custom contends that it would have shipped an additional 200 cars of grain in 1980 if CNW had supplied the cars, but the railroad's records show that Custom ordered only 58 cars that year and that 46 cars were placed. This shipper estimates that if cars are made available it would ship 250 cars of corn to Gulf of Mexico ports in 1981. If this Line is abandoned Custom would have to increase its fertilizer prices to customers, and would have to spend $75,000 to modify its facilities to accommodate increased truck transportation.

Hillandale is an egg processor at New Hampton. Hillandale purchases eggs from farmers in the area, processes the eggs, and ships the eggs by truck to various cities. About 10,000 cases of eggs a week are processed at its plant, located off-track a short distance from CNW's station at New Hampton. Its principal rail traffic consists of egg cartons shipped from points in Mississippi, Massachusetts and California. During 1980 it received 14 cars of cartons. These cars were unloaded into trucks for the short movement to Hillandale's plant. If this Line is abandoned this shipper expects increased costs of about $15,000 per year for bringing in its cartons by truck.

Maynard is a farm cooperative with facilities at Sumner and at two adjacent towns, Maynard and Randalia. It handles grain, about 50 percent of its business, and fertilizer and chemicals, about 30 percent of its business, as well as other farm products. Its rail traffic in 1980 consisted of 70 cars of fertilizer received from sources in Canada and Florida. All of its liquid fertilizer moves by truck, and in 1980 all of its grain also moved by truck. In all, in 1980, Maynard handled 7,000 tons of fertilizer and 4.4 million bushels of grain. In 1979 it shipped 50 cars of grain by rail. According to this shipper a number of other cars were ordered but not supplied by CNW, and Maynard would have shipped 200 cars of grain if cars had been supplied. In 1981 it expects to use 250 cars to ship grain to various Iowa points and the Gulf of Mexico. Presently all of its grain moves to a barge facility on the Mississippi River, and this shipper acknowledges that during most of the year the barge prices for grain are higher. If this Line is abandoned the shipper expects to have to increase its fertilizer prices to farmers.

Feed & Grain, at McIntire, sells farm supplies. About 70 percent of its business is the sale of grain, more than 1 million bushels in 1980. Rail traffic in grain was 80 cars, about 20 percent of this shipper's grain, and the remainder moved by truck. According to this shipper it could have shipped an additional 200 cars of grain in 1980, but the railroad failed to supply the cars despite repeated orders for cars. If cars are made available in 1981 the shipper expects to use 200 cars to move grain to various points. It handled 1,500 tons of fertilizer in 1980. Of this, 200 tons of potash, in 2 cars, were received by rail. If this Line is abandoned Feed & Grain will have to spend $60,000 to modify its facility to handle more truck traffic.

Schult sells grain and farm supplies at Sumner. In 1980 it handled 400,000 bushels of grain, 2,000 tons of feed, and 250 tons of fertilizer. Rail traffic in 1980 was 75 cars of grain outbound and 6 cars of fertilizer and other products inbound. Schult would have shipped an additional 40 to 50 cars of grain in 1980 if CNW had supplied the additional cars, cars ordered on 10 to 12 occasions but never supplied. Schult projects a need for 100 cars in 1981 to ship grain, but as of May 1981 had ordered only 2 or 3 cars. Schult anticipates additional costs to augment its truck receiving facilities if this Line is abandoned.

Butter & Dairy is a farm cooperative located off-rail in Fredericksburg. It has 500 farmer members, and gross sales in 1980 of $32 million. During 1980 it processed 113 million pounds of raw milk, and shipped by rail 5 million pounds of dry milk powder, 55 cars, almost all of which moved for the U. S. government. About 70 percent of its outbound traffic moves by truck. During 1980 it could have shipped an additional 12 cars of dry milk powder if cars ordered had been supplied by CNW. It expects to ship 90 cars in 1981 if cars are made available.

Elevator is engaged in the sale of grain, fertilizer and feed at facilities in Westgate and Oelwein. During 1980 Elevator handled 1.7 million bushels of grain at Westgate and 1,000 tons of fertilizer. In that year it received 4 cars of fertilizer and shipped out 148 cars of grain. It would have used an additional 40 cars for grain that year if cars ordered had been supplied by CNW. In 1981 it would use 190 cars for grain to various destinations if CNW would supply the cars. Its fertilizer business is primarily at its plant located off-rail in Oelwein. At that point inbound cars of fertilizer are transloaded at the railhead to trucks for movement to its plant. If the Line is abandoned Elevator "will pay less to the farmers for grain."

Wayne, a retailer of grain, fertilizer and feed, is a new business located off-rail in Sumner. During the last 4 months of 1980 Wayne handled 250,000 bushels of grain, 300 tons of fertilizer, and 600 tons of feed. Its total rail traffic during that period was 1 carload of potash. About 90 percent of its fertilizer moves by truck and as yet it has shipped no grain by rail. It has recently expanded by purchasing another grain handling company in Sumner.

Prospectively, it expects to use up to 12 cars a year for moving grain, and if rail service is dependable an additional 30 cars for grain and up to 30 cars for fertilizer. As noted, Wayne has no direct loading facility on the Line and must transload shipments to and from its plant. It anticipates, however, that much of the grain purchased from farmers would be delivered directly to the railhead. The effect of abandonment on this shipper is not apparent, since it expects to hire additional employees regardless of the outcome of this proceeding.

Equity is engaged at Elma in the mixing and blending of fertilizer and feed and in the storage and sale of grain. It is a farm cooperative, and 75 percent of its business is in the sale of grain and fertilizer. Its principal use of rail is in the movement of fertilizer, 36 cars in 1980, and in the shipping of grain, 7 cars in 1980. In the latter regard, this shipper alleges that it would have shipped an additional 75 cars of grain in 1980 if CNW had supplied the cars, and if cars are available in 1981 it would ship 285 cars of grain to Chicago and Gulf of Mexico ports. That projection is based on the witness' belief that if rail service is assured and is responsive to Equity's needs it could pay farmers 10 to 15 cents more per bushel and thus secure grain that is now merchandised elsewhere. Most of the year Equity gets a higher price for its rail-shipped grain, but when the barges are operating on the Mississippi River the rail and truck prices at the river ports are competitive.

Sara Lee, a division of Consolidated Foods Corporation, ships bakery products nationwide from its plants at Deerfield, IL and as here pertinent, New Hampton. Each plant bakes different products. Sara Lee is, or has been, a major shipper on the Line. In 1973, its first full year of operation at New Hampton, Sara Lee moved 37.7 percent of all traffic by rail, including 52.7 percent of its inbound traffic. By 1980 this had declined to 14.3 percent of all traffic by rail, including only 22.6 percent of inbound traffic. Outbound rail traffic in 1980 had declined to less than 1 percent of all its outbound traffic. Its inbound traffic consists of ingredients for its baked products, flour, sugar, and strawberries. Additionally, Sara Lee uses more than 100 tons a day of carbon dioxide (CO_2) as a coolant to quick freeze bakery products as they come out of the ovens. Outbound Sara Lee ships primarily frozen bakery products. Its transportation expense, outbound only, in 1980 was in excess of $15 million. Inbound, for rail transportation of food products, Sara Lee had a transportation expense in 1980 of more than $250,000, and spent more than $117,000 for the inbound transportation of CO_2 in 1980-1979. Its gross sales in 1980 ranged up to $300 million.

Sara Lee alleges that abandonment of the Line would have serious adverse effects on Sara Lee. At current rates, substituted motor carrier costs for its annual inbound transportation expense are estimated to exceed rail costs by more than $140,000. The loss of rail service will also increase the burden on Sara Lee's bulk receiving facilities and storage facilities. Sara Lee estimates that it takes two trucks to haul the same amount of flour as one rail car, and four trucks for one rail car of sugar or CO_2. To accommodate increased truck transportation Sara Lee would have to construct an additional truck receiving bay at an estimated cost of up to $200,000. To maintain quality control of its raw ingredients Sara Lee must segregate incoming shipments of raw materials, and as the number of truck shipments increases Sara Lee would incur annual additional labor expense for this purpose of about $23,000 and an additional capital expense of $16,000 to modify systems control in its computers. Sara Lee presently receives a substantial volume of inbound materials by truck; annually more than 600,000 pounds of strawberries, 17 million pounds of carbon dioxide, and 1.5 million pounds of flour. A substantial increase in inbound trucks is expected to increase congestion at the plant and result in increased truck detention charges by about $20,000 annually. As noted, also, Sara Lee uses a substantial volume of CO_2; an interruption in its supply of CO_2, in fact, will immediately shut down its baking operation. At most times it has on hand only enough CO_2 for two days' production. If Sara Lee becomes totally dependent upon truck transportation of this commodity, it will have to increase its on-site CO_2 storage facilities because it believes that, because of weather conditions and other reasons, truck service is less reliable than rail service. Additional CO_2 storage would require a capital outlay of $200,000 and annual additional labor costs.

It this Line is not abandoned, on the other hand, and if CNW provides "prompt and reliable" service, Sara Lee projects increased rail inbound traffic, a volume in 1981 of more than 6.7 million pounds of flour, 9.4 million pounds of sugar, 1.6 million pounds of strawberries, and 14 million pounds of CO_2, an aggregate of more than 32 million pounds, requiring 242 rail cars.

The evidence shows that the Line is intersected at New Hampton by a line of the Milwaukee Railroad at a point about 4,400 feet from the Sara Lee plant. An official of Sara Lee contacted the Milwaukee to determine whether that railroad is interested in extending its service to Sara Lee. He was subsequently informed that Sara Lee's traffic would not provide the Milwaukee with sufficient revenues to justify the purchase of the 4,400 feet of line, at an estimated cost, according to CNW, of about $55,000. On cross-examination Sara Lee's director of operations at New Hampton was asked whether, if this Line is abandoned, Sara Lee would consider purchasing this 4,400 feet of track and right-of-way in order to maintain its rail connections by way of the Milwaukee Railroad. According to this official, however, "Our company's position at this point in time is we are not interested in doing business with a bankrupt railroad."

APPENDIX E

PROTESTANT MINNESOTA SHIPPERS

Brownsdale is an 800-member, farm cooperative locatdd at Brownsdale, MN with a fertilizer blending plant on the Line at Waltham. Brownsdale had gross sales in 1980 of $9.2 million, up from $8 million in 1979 and 1978. The sale of fertilizer, here pertinent, constitutes 15 percent of its business. Annually Brownsdale receives more than 4,000 tons of fertilizers, including potash, phosphate, urea and anhydrous ammonia. In 1978, 22 cars of fertilizer went to Waltham and 29 cars to the main plant at Brownsdale, and in 1979 the Waltham facility received 11 cars and the Brownsdale plant 32 cars. The plant at Brownsdale had been on a line of the Milwaukee Railroad, but in mid-1980 that line was abandoned by the Milwaukee and the plant no longer has rail service. In 1980, 32 cars of fertilizer were shipped to the Waltham plant and 2 cars to Brownsdale. This shipper anticipates the same volume of fertilizer traffic in 1981, with all of the cars going to Waltham. Ammonia and all other traffic of Brownsdale now moves by truck. In the transportation of fertilizer, one rail car is the equivalent in volume of five trucks for this shipper. If Brownsdale receives by truck all of the fertilizer now moving by rail, according to this shipper, transportation costs for fertilizer would increase by about $8 per ton, or about 2.1 percent of its annual fertilizer sales volume. Also, this shipper states that seasonal weight restrictions on local roads would impede the transportation of fertilizer by truck on a year-round basis.

Mower is a farm cooperative with up to 1,000 farmer-members. Its principal facility is on the Line at Sargeant, but it has other facilities at Waltham and on a line of the Milwaukee Railroad at Adams, MN. At Sargeant it sells various farm supplies, and as here pertinent fertilizers. Mower's gross sales in 1980 were about $5 million, of which about 45 percent was attributable to the facility at Sargeant. Of the sales volume at Sargeant, about $1 million was directly dependent upon rail shipments of fertilizer products. In 1980 Mower received 30 cars of potash, phosphate and anhydrous ammonia from various sources, a slight decline from 34 cars in 1979. An intensive sales campaign is underway, and Mower expects to receive increased volumes of fertilizer, up to 33 cars by rail in 1981. According to Mower, it takes about 5 trucks to haul the equivalent of one rail car, and it costs $8 to $10 more per ton to ship fertilizer by truck than by rail. It contends that road weight restrictions and a shortage during peak fertilizer movement seasons of qualified motor carriers would make it difficult to receive its fertilizer if this Line is abandoned, and impose economic hardship on its farmer members.

Reese is a retailer of agricultural supplies at Hayfield. As here pertinent, Reese sells fertilizer which accounts for about 25 percent of gross annual sales, more than $2 million in 1980, Reese receives rail shipments of potash from Canada and phosphates from Florida. Prior to 1979 Reese also received anhydrous ammonia by rail, but these shipments now move by truck as do shipments of other products, such as chemicals. In 1980 Reese received 32 cars of fertilizers, in 1979 33 cars, and in 1978 19 cars. It expects a small increase in traffic in 1981. Based on current transportation rates, Reese estimates that movement by truck of its present rail traffic would increase its costs by $6 to $7 per ton. If regular rail service were assured, this shipper states that it would also ship its grain by rail, grain that now moves by truck.

Century manufactures corrugated drainage tubing at Hayfield. For use in its manufacturing process Century receives rail shipments of polyethylene pellets from sources in Texas and Louisiana. In 1978 Century received 18 cars of pellets, 21 cars in 1979, and 27 cars in 1980. Most of its outbound shipments of finished tubing go to distributors in the Midwest by truck. However, to one distributor in Utah Century ships by rail, 9 cars in 1978, 7 cars in 1979, and 9 cars in 1980. In 1981 Century estimates that it will receive 27 cars of pellets and ship 10 cars of tubing to the Utah distributor. This shipper's economic survival is dependent upon the continued delivery of polyethelene pellets at reasonable cost. Trucks can carry only 22 tons of pellets as opposed to 90 tons that can be carried in a rail car. According to Century, the cost to transport pellets by truck would be prohibitive, as much as $80,000 per year more than rail transportation. If this Line is abandoned Century would have to consider relocating its plant. The railroad concedes that Century's transportation costs would be increased by this abandonment, but differs in the amount of the increase and in the options available to this shipper.

Farmers Coop, at Hayfield, is a farm supply cooperative with about 800 farmer members. It deals in various farm supplies, including as here pertinent fertilizers. Most of its fertilizer moves inbound by rail. In 1978 it received 57 cars of potash, phosphate, urea, and anhydrous ammonia, in 1979 it received 31 cars, and 27 cars in 1980. During these same years its gross annual sales increased from $2.3 million in 1978, to $2.7 million in 1979, to $3.2 million in 1980. Sales of fertilizer constitute about 35 percent of its gross sales. Despite an annual decline in its rail carload shipments of fertilizer, Farmers Coop projects a need for 35 cars of fertilizer in 1981. This shipper estimates that the cost of receiving its fertilizer by truck would be as much as 30 percent higher than the cost of rail movement. Moreover, its storage facilities are not well suited to receive truck shipments of fertilizer, and seasonal weight restrictions on the roads prevent trucks from being effectively used to carry fertilizer.

Huntting, at Hayfield, is a branch of a 13-branch dealer, based at Austin, MN, engaged in the sale of grain, seed, feed and agricultural supplies. At Hayfield Huntting stores and ships grain. Up to 20 percent of its grain moves by rail, the remainder by truck. In 1978 Huntting shipped 50 cars of grain, 57 cars in 1979, and 20 cars in 1980. About 20 cars of grain are projected for 1981. Rail carloads of grain go to points in Texas, Louisiana and Wisconsin, as well as to Duluth, MN. Some of its grain moves by truck to barge facilities on the Mississippi River, and during the navigational season Huntting finds such movements to be more profitable than rail movements to other points.

Hayfield Lumber sells building materials and coal at Hayfield. Its building materials, which constitute 80 percent of its business, all move by truck, but its coal comes in by rail and is unloaded over conveyer belts that carry the coal to storage bins. The design and construction of its coal receiving facility makes it impossible to receive coal by truck, and according to this shipper the cost of modifying this facility to permit inbound shipments of coal by truck would be prohibitive. If Hayfield Lumber because of this abandonment is unable to have coal delivered by rail, it will be forced to discontinue the sale of coal. It sells its coal to individuals for home heating purposes, and is the only coal dealer within a 70 to 80 mile radius. It received 5 cars of coal in 1980 and projects 6 to 7 cars of coal in 1981.

Sargeant Grain has a feed mill, a grain elevator, and corn storage bins on the Line at Sargeant. It has annual sales in excess of $5 million, attributable 80 percent to grain and 20 percent to feed. It is concerned here with turkey litter, comprising less than half of one percent of its business. It discontinued use of rail for its grain several years ago and it all moves by truck now. But it does receive an occasional rail shipment of pitch, peat moss and rice hulls used as turkey litter. There were three such carloads in 1980 and 1979, and one car in 1978. Sargeant Grain describes itself as "not a substantial user of rail service."

Midland is a farm cooperative, one of an association of more than 200 cooperatives with headquarters at Minneapolis, MN. At Hayfield, in a plant that commenced operations in 1980, Midland manufactures liquid fertilizer. By rail, this plant receives potash from Canada, phosphate from Florida, and phosphoric acid from North Carolina, all used in the manufacture of liquid fertilizer. In 1980 Midland received 29 cars of dry fertilizer and phosphoric acid, and in 1981 it expects to receive 50 cars, 35 cars of phosphoric acid and 15 cars of dry fertilizer. According to Midland, the cost of shipping phosphoric acid by truck is about four times more expensive than by rail, and dry fertilizer by truck costs about $6 to $7 more per ton by truck than by rail. The phosphoric acid moves in special, rubber-lined cars, and is shipped at a temperature of about 175 degrees. If it cools to under 100 degrees it will cake and will be unusable. At the Hayfield plant it must be mixed with anhydrous ammonia and water to be unloaded and stored. For this reason it cannot feasibly be transloaded from rail to truck without losing too much heat in the process. The Midland group of cooperatives owns a substantial fleet of motor vehicles as well as a barge line. It also owns a company that is one of the largest producers of fertilizer in the country.

Nelson's Gas at Hayfield, as here pertinent, sells liquid propane gas. Sales of gas account for about 75 percent of its gross sales, about $500,000 in 1980. All of its gas originates in Canada and moves via pipeline to Mankato, MN, and is hauled by truck to Nelson's facility at Hayfield. However, in the fall and winter, when large quantities of gas are used by farmers to dry corn, the pipeline company

allocates its gas and Nelson cannot obtain all its needs. At these times it uses rail service to ship additional gas to supply its customers' needs. In 1978 it received 18 carloads of gas, 6 cars in 1979, and only 2 cars in 1980.

Power Span is a manufacturer of pre-stressed concrete poles for use in electrical power transmission. These concrete poles range in length from 40 to 92 feet and weigh between 6,000 and 25,000 pounds. The poles are manufactured by Power Span at Hayfield in a plant specifically and uniquely constructed to manufacture such poles. The plant was built in 1976, operated intermittently by its former owner, and closed down in February 1979. Power Span bought the plant in August 1979 and commenced operations in June 1980. Power Span is the largest employer in the Hayfield area. Its gross sales in 1980 exceeded $1.6 million, but it did not make a profit. Substantial sales of its product did not commence until late 1980 and early 1981. Between June 1980 and March 1981 Power Span shipped 54 carloads of poles, upwards of 200 poles aggregating more than 4.6 million pounds. Additional carloads of poles were scheduled under contract to be delivered during the first quarter of 1981, and Power Span has commitments to ship more than 140 cars of poles to various utilities during the remainder of 1981. Power Span projects a total of more than 230 carloads of poles to be shipped during 1981. Rail freight charges in 1981 are expected to approach $1 million, and to exceed $2 million by 1983. About 20 percent of its total sales revenues are expended for rail freight charges.

Most of Power Span's poles, about 90 percent, are longer than 70 feet. The movement by truck of poles more than 45 feet long presents difficulties. They are considered over-length in every state, and the movements are subject to various restrictions, including special permits, escort cars, daylight hours, and others. By truck the poles move on expandible trailers, usually in short supply. In fact, the varying weight and length restrictions on the highways make it virtually impossible to move the poles by truck beyond a radius of about 100 miles, although on rush orders and in special circumstances Power Span has made truck shipments and absorbed the difference in shipping costs, which are so high by truck as to eliminate this mode as a realistic option. As Power Span puts it, trucks are just not suited to haul poles which may be over nine stories high and weigh over 12 tons.

Power Span is now in the preliminary stages of bidding on new jobs which would entail, if successfully completed, the delivery over a period of years of as many as 7,000 poles ranging in length from 85 to 110 feet each, and requiring up to 1,200 rail cars for movement to various utilities in Colorado, New Mexico, Oklahoma, Kansas, Texas and the Carolinas. For this business, it contends, it requires continued rail service from Hayfield.

APPENDIX F

Chicago and North Western Transportation Company
Oelwein, Iowa to Randolph, Minnesota
Revenue and Cost Data
for the Base Year
8/1/79 to 7/31/80
and for a projected Subsidy Year

	Base Year	Subsidy Year 1/
Revenues Attributable For:		
1. Freight orig. and/or term.	$1,420,566	$1,623,115
2. Bridge traffic	7,304,281 2/	7,304,281 2/
3. All other revenues	28,242	29,654
4. Total revenues	8,753,089	8,957,050
Avoidable Costs For:		
5. On-Branch costs	957,874	1,275,954
6. Off-Branch costs	665,200	760,046
7. Overhead costs	3,597,167 3/	3,597,167 3/
8. Total avoidable costs	5,220,241	5,633,167
Avoidable Loss:		
9. a) Avoidable loss (Gain) from operations	(3,537,691)	(3,328,726)
b) Opportunity costs	1,016,191 4/	—
c) Total avoidable loss (gain)	(2,521,500)	(3,328,726)
Subsidization Costs For:		
10. Rehabilitation	—	—
11. Administrative costs	—	16,528
12. Casualty reserve account	—	—
13. Total subsidization costs	—	16,528
Return On Value For:		
14. a) Valuation of property	—	10,978,472
b) Working capital	—	51,687
c) Income tax benefit	—	—
d) Net liquidation value	—	10,926,785
15. Rate of return	—	12.1 percent 5/
16. Total return on value	—	1,328,395
Estimated Subsidy:		
17. Estimated subsidy	—	1,978,990

1/ Year ending July 31, 1981.
2/ Five-twelfths of 1979 overhead revenue added to overhead revenues for seven months of 1980.
3/ Five-twelfths of the average of 1979 replacement and historical costs added to the average of these costs for seven months of 1980.
4/ Net liquidation value of $10,926,785 multiplied by 9.3 percent.
5/ Railroad industry's current after-tax cost of capital.

BEFORE THE

INTERSTATE COMMERCE COMMISSION

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY --- ABANDONMENT BETWEEN OELWEIN, IOWA AND RANDOLPH, MINNESOTA	)))	Docket No. AB-1 (Sub-No. 113F)

APPEAL OF PROTESTANTS, MINNESOTA SHIPPERS GROUP, FROM INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE PAUL J. CLERMAN, SERVED JULY 15, 1981

BROWNSDALE COOPERATIVE ASSOCIATION
CENTURY PLASTICS, INC.
FARMERS COOPERATIVE OIL ASSOCIATION
HAYFIELD DEVELOPMENT CORPORATION
HAYFIELD LUMBER COMPANY
HUNTTING ELEVATOR COMPANY, INC.
MIDLAND COOPERATIVES, INC.
MOWER COUNTY SERVICE COMPANY
NELSON'S GAS, INC.
POWER SPAN, INC.
REESE FARM CENTER, INC.
SARGEANT GRAIN COMPANY

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Due Date: August 4, 1981

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BEFORE THE

INTERSTATE COMMERCE COMMISSION

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY --- ABANDONMENT BETWEEN OELWEIN, IOWA AND RANDOLPH, MINNESOTA	)))	Docket No. AB-1 (Sub-No. 113F)

APPEAL OF PROTESTANTS, MINNESOTA SHIPPERS GROUP, FROM INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE PAUL J. CLERMAN, SERVED JULY 15, 1981

STATEMENT OF THE CASE

On January 30, 1981, Chicago and North Western Transportation Company (C&NW) filed an application for authority to abandon its line between Oelwein, Iowa and Randolph, Minnesota, a distance of 144.8 miles.[1]

Brownsdale Cooperative Association, et al. (the Minnesota Shippers Group filing this appeal) opposed abandonment of a 19.2-mile segment of the line between Dodge Center and Sargeant, Minnesota (Milepost Nos. 442.0-457.2), and between Hayfield and Waltham, Minnesota (Milepost Nos. 1.2-5.2). The Iowa Department of Transportation opposed abandonment of the 65.2 miles of line located in Iowa. A group of Iowa shippers opposed the entire application.

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[1] A 1.8-mile segment of track at Dodge Center, Minnesota is excluded from the abandonment. At that point, C&NW's Oelwein-Randolph line connects with C&NW's east-west line between Mankato and Minnesota City, Minnesota.

Other opposition to the application was not implemented by evidence or briefs.

A hearing on the application was held at Oelwein, Iowa between May 5 and May 8, 1981, before Administrative Law Judge (ALJ) Paul J. Clerman.

In an initial decision served July 15, 1981, ALJ Clerman found that the application should be granted in full.

ALJ Clerman's findings were published in the Federal Register of July 15, 1981.

On July 24, 1981, an offer of financial assistance for continued operation of the 19.2-mile Dodge Center-Sargeant and Hayfield-Waltham segment was filed in behalf of some of the companies belonging to the Minnesota Shippers Group.[2]

Administrative appeals of the initial decision may be filed on or before August 4, 1981. 49 CFR § 1121.36(e)(3)(iii) (interim).

GOVERNING STANDARDS AND PROCEDURES

This appeal is governed by the appellate proce-

[2] It was made clear in that offer, however, that the offerors intended to pursue their administrative remedy with respect to the merits of the initial decision as to the 19.2-mile segment, and, if necessary and appropriate, their judicial remedy in that respect, as well. Filing of the offer at that time was necessitated by the 10-day deadline of 49 USC § 10905(c) in view of the Commission's practice of publishing the findings of the initial decision in the Federal Register as if they constituted final Commission findings in the matter. The companies filing that offer are willing to subsidize continued operation of that segment only if and when it is lawfully determined that abandonment of that segment is permitted by public convenience and necessity.

dures of 49 CFR § 1121.36(e), adopted on an interim basis on November 25, 1980, Abandonment of Railroad Lines and Discontinuance of Service, Ex Parte No. 274 (Sub-No. 6), 45 FR 78144, 78148. Those procedures are designed to implement 49 USC § 10904(c)(3), which provides, in pertinent part, as follows:

> "Thirty days after such decision, the initial decision (in an investigated abandonment case) shall become the final decision of the Commission unless, during the interim, the Commission decides to hear appeals."

Pursuant to 49 CFR § 1121.36(e)(2) (interim), an appeal of an initial decision in an abandonment case will be heard only if the Commission finds either of the following:

(i) the action involves a matter of general transportation importance, or

(ii) the action would be affected materially because of new evidence, changed circumstances, or material error.

SCOPE OF APPEAL

This appeal seeks reversal of that portion of the initial decision by which abandonment of the 19.2-mile Minnesota line segment was authorized. The Commission's authority to permit abandonment less extensive than that requested is evident in the governing statute, 49 USC § 10903(b)(1). See Norfolk S. Ry. Co. Abandonment, 282 ICC 376, 387 (1952).

MATTER APPEALED

The initial decision denied the requested retention of rail service on the 19.2-mile Minnesota line segment in terse and summary fashion, without attempting to differentiate it from other proposals for partial abandonment, viz. (initial decision, sheet 23):

> "As earlier stated, several alternate proposals for partial abandonment were offered by protestants. None of these proposals were (sic) drawn with sufficient detail to permit comprehensive analysis as to profitability, and each relied upon traffic projections made by the shippers. Based upon actual traffic and revenue data of record, none of these alternate proposals gave promise of sufficient revenues to overcome all pertinent expenses, including opportunity costs, so as to produce net revenues. Contrary to the position taken by protestants, the burden of proving the viability of suggested alternatives to abandonment, such as partial abandonment, is upon protestants (citations omitted). Protestants have failed to sustain that burden."

It is not disputed that protesting local interests have the burden of going forward with the evidence as to the propriety of retention of rail service on any segment comprising less than the entire line proposed for abandonment, but it is strenuously disputed that such burden was not sustained as to the 19.2-mile Minnesota line segment.

The ultimate finding of the initial decision that the burden of proof was not sustained as to retention of rail service on the 19.2-mile Minnesota line segment is

based upon three subsidiary findings, i.e.:

1. that evidence with respect to such retention of rail service is not sufficiently detailed to permit comprehensive analysis as to profitability;

2. that such evidence relies upon traffic projections made by shippers; and

3. that based on actual (i.e., historical) traffic and revenues, continuation of rail service on the segment would not likely result in a full opportunity cost rate of return for C&NW.

As will be shown, the first two of those subsidiary findings, which were treated in the same sentence of the initial decision, are materially erroneous as a matter of fact as applied to retention of rail service on the 19.2-mile Minnesota line segment. The appeal should be heard to correct such obviously erroneous findings of fact. 49 CFR § 1121.36(e)(2)(ii) (interim).

It is apparent, however, that the real basis for the initial decision's rejection of the requested retention of rail service on the 19.2-mile Minnesota line segment is its finding that such operation would not result in a full return of opportunity costs. That determination is the first to our knowledge that opportunity costs alone warrant abandonment of a line segment. As will be shown, that determination raises very serious questions under the governing statute which constitute a matter of general transportation importance. Such questions should be resolved in this appeal. 49 CFR § 1121.36(e)(2)(i) (interim).

ARGUMENT IN SUPPORT OF APPEAL

I. THE EVIDENCE IN SUPPORT OF RETENTION OF RAIL SERVICE ON THE 19.2-MILE MINNESOTA LINE SEGMENT ADEQUATELY REFLECTS THE PROFITABILITY OF THAT SEGMENT WITHOUT RELYING ON SHIPPERS' TRAFFIC PROJECTIONS.

The evidence with respect to the likely future profitability of the 19.2-mile Minnesota line segment was presented by Mr. George C. Shaffer, an expert transportation consultant retained by the Minnesota Shippers Group. It is critical to observe that Mr. Shaffer's testimony regarding such profitability was not attempted to be rebutted by C&NW in any respect, nor were his expert qualifications subjected to any challenge.

Contrary to the finding of the initial decision, Mr. Shaffer's evidence did not rely exclusively, or even primarily, upon traffic projections made by shippers. Mr. Shaffer's evidence showed that the 19.2-mile Minnesota line segment was profitably operated in the base year (12 months ended July 31, 1980) on the basis of C&NW's own evidence of actual revenues and costs for that period (Ex. 18a, p. 9, Ex. GCS-6).[3]

As noted, the initial decision also found that the evidence in support of retention of service on the 19.2-mile Minnesota line segment was not sufficiently detailed to per-

[3]Mr. Shaffer made a minor correction to C&NW's base year off-branch costs because of C&NW's failure to have followed the Commission's abandonment costing regulations in one specific respect (Ex. 18, pp. 11-12).

mit comprehensive analysis as to profitability. The record shows the contrary, as indicated below, but it should be noted that such a broad, negative finding is so vague as to be meaningless, and is clearly not a valid basis upon which to predicate a determination that the burden of proof was not sustained. The finding does not identify any purported defect(s) in the evidence --- e.g., "not sufficiently detailed" as to revenues, as to off-branch costs, as to on-branch costs. The finding is legally deficient because its meaning cannot be determined so as to measure its consistency with the record. Cf. United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 294 U.S. 499, 510-511 (1935).

The primary source of the evidence that operation of the Minnesota line segment was profitable in the base year is C&NW's own evidence and workpapers. Protestants' Witness Shaffer's calculation of the base year profitability of operation of that segment utilized actual C&NW revenues (Ex. 18, p. 14) and off-branch costs (id, pp. 11-12; see footnote 2, supra) of the traffic actually originating or terminating on that line segment in that year. Mr. Shaffer also used C&NW's own evidence of on-branch costs in order to allocate such costs to the traffic originating or terminating on the segment on the basis of that traffic's gross ton-miles (maintenance of way), crew and locomotive time (transportation and maintenance of equipment), and car-miles and car-days (freight car costs) (Ex. 18, p. 13). The end

result was a detailed showing of likely profitability if the 19.2-mile Minnesota line segment had been operated during the base year without the remainder of the line proposed for abandonment.

The evidence relating to the profitability of the Minnesota line segment was developed in accordance with Commission precedent on the subject. For example, in Norfolk S. Ry. Co. Abandonment, supra, in considering the propriety of a partial abandonment, the Commission said (282 ICC, at p. 386):

> "The financial results of operation can be estimated for each of the segments mentioned above by apportioning the expenses of operation according to their respective shares of the actual costs and average mileage bases shown for the line, and allocating shares of the total system revenues according to the traffic handled by each."

Indeed, the Commission has partially denied abandonments on the basis of evidence as to profitability of segments which was considerably less detailed and precise than the evidence as to profitability of the Minnesota line segment involved in this case. See, e.g., Baltimore and Annapolis R. Co. Abandonment, 348 ICC 678, 696-703 (1976); Chicago & N.W. Ry. Co. Abandonment, 317 ICC 207, 208-213 (1961); Norfolk S. Ry. Co. Abandonment, supra.

It follows that the initial decision erred materially in finding that the evidence lacked sufficient detail to permit adequate analysis of the profitability of the

Minnesota line segment, and that such evidence relied upon shippers' traffic projections. The Commission should find on appeal that evidence as to profitability of that segment was detailed, unrebutted and in accordance with Commission precedent, and that such evidence supports retention of rail service on that segment.

II. THAT CONTINUED OPERATION OF THE MINNESOTA LINE SEGMENT WOULD NOT RESULT IN FULL RECOVERY OF C&NW'S OPPORTUNITY COST AS TO THAT SEGMENT CANNOT ALONE WARRANT ABANDONMENT OF THAT SEGMENT.

The initial decision correctly found that it had not been shown that the profit from operating the Minnesota line segment in the base year would result in full recovery of C&NW's opportunity cost as to that segment.[4] However, the initial decision determined on that basis alone that retention of rail service on that segment was not shown to

[4]The unrebutted evidence showed a base year operating profit for the Minnesota line segment of $64,872 (Ex. 18a, p. 9, Ex. GCS-6), which provides a rate of return of 3.7 percent on the estimated net liquidation value of the segment ($1,739,848), as adjusted to account for the findings of the initial decision as to the values of reusable rail (see initial decision, sheets 10 and 19, and Ex. 18, p. 15, Ex. GCS-4, p. 2). Recent Commission decisions have indicated that a rate of return of 9.3 percent of net liquidation value is necessary to avoid incurrence of an opportunity cost with respect to any line segment. Illinois Central Gulf R. Co. Abandonment, 363 ICC 729, 733-734 (1980); Texas and Pacific Railway Company Abandonment, 363 ICC 666, 673-675 (1980).

be "viable," warranting abandonment of the segment.[5] The action of the initial decision in that respect involves an issue of general transportation importance, i.e., whether or not abandonment may be lawfully authorized solely on the basis that continued operation of a line would not result in full recovery of opportunity cost.

The action of the initial decision on that issue is directly at odds with the determination of the Court in City of Cherokee v. ICC, 641 F.2d 1220 (8th Cir., 1981). In that case, the Court framed the opportunity cost issue in terms of the differing findings of the administrative law judge (ALJ) and the Commission thereon, viz. (641 F.2d, at p. 1229):

> "The ALJ recognized that if the line were abandoned and all the properties sold, the money thereby realized could be invested in a more lucrative market, and ICG would realize a significant return on its capital investment in the Sioux Falls District line. She did not believe, however, that this factor should necessarily be determinative of the entire case. She correctly reasoned that Congress intended this factor to be measured against the burden that abandonment would impose on the affected communities and shippers. 49 U.S.C. §§ 10903-10905 (Supp. II 1978). The Commission stated in substance that if the carrier could not operate the branch line as a profitable going concern (and

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[5] In that there was an operating profit on the segment in the base year, and there was no claim that the segment required rehabilitation to achieve FRA Class 1 minimum track safety standards, opportunity cost was clearly the sole basis for the determination that retention of rail service on the segment was not shown to be viable or, in other words, that abandonment of the segment was warranted.

> if it could turn a greater profit through abandoning the line and selling its property holdings), then abandonment would be permissible."

The Court ruled squarely in favor of the findings of the ALJ as to opportunity cost, viz. (641 F.2d, at pp. 1229-1230, emphasis added):

> "The ALJ was right and the Commission was wrong. Congress did not intend for the Commission to authorize abandonment of particular rail lines solely because the carrier's capital investment in the line could be more profitably put to work elsewhere. Congress intended that the Commission determine the degree and severity of the benefits and burdens which abandonment would occasion to all affected parties. The Commission does not have the authority to modify the measuring mechanism mandated by Congress."

There was no attempt in the initial decision in the instant case to measure the opportunity cost of continued operation of the Minnesota line segment against the burden that abandonment of that segment would impose on the affected communities and shippers.[6]

This case is also the first instance to our knowledge in which a finding of "burden on interstate commerce" from continued operation of a line segment has been predicated solely upon opportunity cost (i.e., where the line

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[6] There was extensive evidence that abandonment of the Minnesota line segment would have a very severe adverse effect on the protesting local shippers because of the inadequacy of motor carriage as alternative transportation (e.g., Ex. 18, p. 35, pp. 124-134). The initial decision acknowledged that evidence (sheet 13 and Appendix E, page 3), but it failed to give any consideration to it in weighing the benefits and burdens associated with continued operation of that segment.

produces an operating profit and needs no rehabilitation - see footnote 5, supra). It is highly questionable whether or not such a determination comports with the governing statute. Opportunity cost, as a factor in abandonment cases, was billed as an "additional argument . . . that operation of a given line is a burden on interstate commerce." Abandonment of R. Lines - Use of Opportunity Costs, 360 ICC 571 (1979), at p. 578, emphasis added. It cannot be successfully argued that Congress gave the Commission discretion to permit abandonment of any line segment solely on the ground that its operation does not result in a "reasonable" rate of return.

It follows that the finding in the initial decision to the effect that continued operation of the Minnesota line segment was not shown to be "viable," solely on the basis of the opportunity cost associated with such operation, is materially erroneous as to an issue of general transportation importance.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, it has been shown that the action of the initial decision relating to continued operation of the 19.2-mile Minnesota line segment would be affected materially if the material error identified in this appeal were corrected. Moreover, it has been shown that such action involves a matter of general transportation importance relating to the appropriate considera-

tion of opportunity cost in rail abandonment cases. Upon either or both of those criteria, the Commission should determine to hear this appeal. 49 CFR §§ 1121.36(e)(2)(i) and (ii) (interim). Upon consideration of this appeal, a decision should be entered denying abandonment of such Minnesota line segment. Protestants, Minnesota Shippers Group, respectfully so pray.

Respectfully submitted,

BROWNSDALE COOPERATIVE ASSOCIATION
CENTURY PLASTICS, INC.
FARMERS COOPERATIVE OIL ASSOCIATION
HAYFIELD DEVELOPMENT CORPORATION
HAYFIELD LUMBER COMPANY
HUNTTING ELEVATOR COMPANY, INC.
MIDLAND COOPERATIVES, INC.
MOWER COUNTY SERVICE COMPANY
NELSON'S GAS, INC.
POWER SPAN, INC.
REESE FARM CENTER, INC.
SARGEANT GRAIN COMPANY

Protestants

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Of Counsel

August 4, 1981

CERTIFICATE OF SERVICE

I hereby certify that I have, this 4th day of August, 1981, served a copy of the foregoing appeal upon all parties of record by first-class mail, postage prepaid.

Thomas F. McFarland Jr.
Thomas F. McFarland, Jr.

EC

SERVICE DATE
OCT 9 1981
RECEIVED
OCT 15 1981
LAW DEPARTMENT
C&NW TRANSP. CO.

INTERSTATE COMMERCE COMMISSION

CERTIFICATE AND DECISION

Docket No. AB-1 (Sub-No. 113F)

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY
ABANDONMENT BETWEEN OELWEIN, IA AND RANDOLPH, MN

Decided: October 7, 1981

By decision served July 15, 1981, Administrative Law Judge (ALJ) Paul J. Cierman, approved the application of Chicago and North Western Transportation Company (CNW) for authority to abandon 144.8 miles of rail line in Fayette, Bremer, Chickasaw, Howard, and Mitchell Counties, IA and Mower, Dodge, Goodhire, Rice, and Dakota Counties, MN.

Protestants Brownsdale Cooperative Association, Century Plastics, Inc., Farmers Cooperation Oil Association, Hayfield Development Cooperation, Hayfield Lumber Company, Huntting Elevator Company, Inc., Midland Cooperatives, Inc., Mower County Service Company, Nelson's Gas, Inc., Power Span, Inc., Reese Farm Center, Inc., and Sargeant Grain Company (the Minnesota Shippers Group) filed a joint appeal to a portion of the initial decision. Their joint appeal is limited to issues concerning the abandonment of 19.2 miles of CNW's trackage between Dodge Center and Sargeant, MN (Milepost Nos. 442.0-457.2) and between Hayfield and Waltham, MN (Milepost Nos. 1.2-5.2). CNW has responded to the Minnesota Shippers Group's appeal.

CNW has also filed petitions requesting the immediate issuance of a partial abandonment certificate and the modification of certain conditions imposed in the initial decision. No party responded to CNW's petitions.

Additionally, in letters dated August 17, 1981, and September 1 and 3, 1981, the Railway Labor Executives Association (RLEA), the Brotherhood of Locomotive Engineers (BLE), and the United Transportation Union (UTU), respectively,

seek to file "protests" pursuant to 49 U.S.C. §10904(b), to CNW's request that a partial certificate be issued.

The issues raised in these various pleadings will be discussed in turn.

Abandonment of the Dodge Center - Sargeant and Hayfield - Waltham Segment.

As indicated above, the Minnesota Shippers Group's appeal is limited to issues concerning the abandonment of a 19.2 mile segment of this line. It argues that: (1) the ALJ improperly based his decision on opportunity costs exclusively; and (2) the ALJ failed to recognize the profitability of this segment as demonstrated by applicant's own evidence of revenues and costs.

The burden of proof in abandonment proceedings is well settled. Applicants have the burden of showing that the public convenience and necessity permit abandonment of the entire line. Protestants have the burden of demonstrating that the retention of a portion of the line is required by the public convenience and necessity. Cooperative Legislative Committee v. I.C.C., No. 78-3477, 6th Cir., Order filed September 30, 1980, p. 3; State of ME Dept. of Transp. v. I.C.C., 587 F. 2d 541, 543 (1st Cir. 1978); Village of Candor v. United States, 151 F. Supp. 889, 892 (D.N.Y. 1957). In determining whether the present or future public convenience and necessity require or permit an abandonment, the burden on the applicant from the continued operation of the line must be weighed against the need for service and harm to affected shippers and communities from abandonment. Colorado v. United States, 271 U.S. 153 (1926).

In this proceeding, the ALJ properly recognized the various parties' respective burdens of proof, and carefully balanced the relevant evidence of record in reaching his ultimate conclusion.

Although sizeable opportunity costs played a significant part in the ALJ's determination that abandonment of the entire

line is justified, it cannot be said that they were the sole basis for his conclusion. CNW clearly demonstrated that the operation of the entire line is unprofitable and unduly burdensome on the railroad and interstate commerce. Applicant properly excluded the revenue derived from, and the expenses associated with, overhead traffic on this line in its determination of the line's earning capacity. Exercising proper managerial discretion, applicant has determined that overhead traffic formerly moving over this line will be diverted to other lines for reasons of economy and efficiency. Consequently, when considering only that traffic originating and terminating on the line, and the expenses incident to such traffic, we find that CNW has operated this line at a loss in recent years. In the base year (operations for the 12 months ended July 31, 1980), applicant incurred an avoidable loss of $174,266 from operations. This figure, coupled with sizeable opportunity costs,[1]/ serves to demonstrate the burden continued operation of the entire line would impose on applicant and interstate commerce. It should be noted that these entire line figures are not contested on appeal.

Weighed against this burden on applicant and interstate commerce are the effects of abandonment on rural and community development in the area, and on shippers and receivers located on the line. The ALJ pointed out that there was no evidence developed that abandonment of the line would have a significant adverse impact on rural or community development. In fact, he noted, one protesting community-- Hayfield, MN --has been able to attract new businesses despite the prospect of abandonment.

1/ In applying the 9.3 percent pretax cost of capital figure developed in Texas and Pacific Railway Company- Abandonment, 363 I.C.C. 666 (1980), and found to be applicable to the industry generally in Illinois Central Gulf R. Co. - Abandonment, 363 I.C.C. 729 (1980), to the net liquidation value of applicant's concerned property ($10,926,785), we arrive at an opportunity cost of $1,016,191. The net liquidation value used in this computation was developed by protestant Iowa Department of Transportation.

Admittedly, shippers and receivers on the line will be seriously impacted by this abandonment. The ALJ noted that these parties will suffer some inconvenience and increased transportation costs, but that, on the whole, there is persuasive evidence that adequate alternative sources of transportation will fill the void created by abandonment of this line.

Weighing all these factors in balance, as well as evidence of declining usage of the line by shippers, the speculative nature of future traffic predictions, applicant's marginal financial condition, and the necessity for increased maintenance expenditures on the line, the ALJ reached the justifiable conclusion that applicant met its burden of proof.

The Minnesota Shippers Group has simply failed to establish with any degree of specificity that service could be maintained profitably over the 19.2 mile segment in which they are interested. At hearing, and in its post-hearing brief, applicant has pointed out glaring faults in these protestants' evidence.

Protestants have taken applicant's cost and revenue and attempted to "break out" pertinent data for the 19.2 mile segment. Using this data, as adjusted for alleged inaccuracies, protestants' witness, Mr. George C. Shaffer, concluded that during the base year applicant derived net revenue of $64,872 from operation over the 19.2 mile segment. This figure was reached by subtracting branch costs of $23,802 and off-branch costs of $73,769 from revenue of $162,443. Applicant takes specific exception to this computation in only one respect. In determining on-branch costs, Mr. Shaffer developed a maintenance-of-way (M-O-W) expense of $5,304 ($279 per mile). The witness took the total M-O-W expense attributable to the entire 144.8 miles of rail line and simply apportioned it on the basis of mileage. In this manner, the witness arrived at a

$40,301 M-O-E expense for the 19.2 mile of track, and he then further apportioned that figure on the basis of the gross tons of protestants' traffic. We agree with applicant that this method significantly underestimates the M-O-W expense. An appropriate level of maintenance cannot be sustained on the basis of a $279 per mile expenditure. As applicant points out, if this segment of track is maintained, shippers and receivers on the line would have to pay the entire M-O-W expense, not just an apportionment based on tonnage; that is, using Mr. Shaffer's computations, a M-O-W expense of $40,301. Assuming protestants' other calculations are correct, this would mean that a profit of $29,875 was garnered from operations on this 19.2 mile segment during the base year. Moreover, this marginal "profit" does not take into consideration the significant opportunity costs CNW incurred on this segment, which, by protestants' own calculations, amount to $161,806.

Further, protestants fail to establish future profitability with any measure of certainty. In the circumstances present, where protestants seek continuation of service on only a small segment of a line being abandoned, past operations and expenses have very little relationship to the future.

Protestants failed to provide a complete operating plan for future service on the segment, and failed to quantify the costs for any such plan. Witness Shaffer admitted that his optimistic estimates of future traffic increases were based on unproven assertions of his shipper clients (transcript p. 581). No documentary evidence was presented to substantiate the predictions of increased business. Moreover, he acknowledged that he did not know how much money it would take to maintain this line segment in the future (transcript p. 595), and that his computations did not prove that the segment could be retained profitably.

In these premises, we agree with the ALJ that protestants have failed to satisfy their burden of proving the viability of their partial abandonment proposal.

We conclude that the appeal of the Minnesota Shippers Group should be denied, because the decision of the ALJ is correct in all material respects.

Issuance of a Partial Abandonment Certificate. - CNW has requested the immediate issuance of an abandonment certificate for all trackage involved in this application except the 19.2 mile segment which is the subject of the previously discussed appeal. That segment is also the subject of a subsidy offer filed by the Minnesota Shippers Group under 49 U.S.C. §10905.

An abandonment certificate may be issued only following the issuance of a final decision of the Commission on the merits of the proposal. See 49 U.S.C. §10904(c)(3) and 49 CFR 1121.37(b)(2)(iii). No portion of the initial decision can become final during the pendancy of a discretionary appeal. Therefore, prior to disposition of the Minnesota Shipper Group's appeal, we are precluded from issuing a partial abandonment certificate. As detailed previously, however, we are denying protestants' joint appeal in this decision. Consequently, we believe it is appropriate to issue a partial abandonment certificate in conjunction with this final decision. Because of the pending offer of financial assistance under section 10905 of the Act, however, we cannot issue a certificate covering the 19.2 mile segment of the line being considered for subsidization.

Concerning the ongoing subsidy offer, we have been requested to determine its amount and terms based on the avoidable cost of providing continued rail transportation, plus a reasonable return on the value of the line [see 49 U.S.C. §10905(f)(1)]. Our determination will be reached by October 24, 1981. Our decision in this matter will be binding upon the parties unless the sole

offeror in this proceeding withdraws its offer within 10 days. If the offer was to be withdrawn in a timely fashion, we would issue an abandonment certificate for the 19.2 mile segment as expeditiously as practicable. Of course, if our determination is accepted, a certificate would be withheld during the subsidy period.

Modification of Conditions. - CNW has requested that the 120-day public-use condition imposed by the ALJ be modified to permit the removal of the track. We will agree to this proposed modification.

The environmental threshold assessment survey (ETAS) prepared by the Commission's Section of Energy and Environment recommended the imposition of a public use condition because the right-of-way would be suitable as a multipurpose trail for snowmobiling, biking, and hiking. (Generally speaking, the "public use" provisions of 49 U.S.C. §10906 deal with the acquisition of rail properties for other public purposes; and, therefore, no useful purpose is served by requiring an applicant to keep rails and ties in place during the 120-day negotiating period. Consequently, since potential interest in this right-of-way involves the non-rail use of the property, the condition imposed by the ALJ will be amended to permit the removal of rail and ties. Cf. Chicago and North Western Transp. Co. - Abandonment, 354 I.C.C. 735, 740 (1978).

In certain instances, however, prospective purchasers of these properties may intend to acquire them for mass transportation or other public purposes necessitating maintenance of the track (for example, one other such public use would be conversion of the line into a scenic railway). Such a transaction would fall within the public use provisions of section 10906. Upon an affirmative showing that the existing rail line could be used for mass transportation or similar

purposes requiring retention of the track, the public use condition would provide for maintenance of rail and ties. Because the Commisison would need this information at the time it makes its determination as to whether a proposed abandonment would be required or permitted by the present or future public convenience and necessity, the information should be submitted to us within the time provided for filing comments and protests to the proceeding. Thus, information about possible mass transportation use of rail properties proposed for abandonment, requiring maintenance of rail and ties on the right-of-way, must be filed with the Commission.

Letter "protests." - Finally, the three letter "protests" submitted by the Labor interests after the service date of the ALJ's initial decision cannot be accepted. 49 U.S.C. §10904(b) and 49 CFR §1121.36(c)(1) provide that written comments and protests in abandonment proceedings must be filed within 30 days after the application is filed. Consequently, none of these pleadings was tendered in timely fashion.

We note, however, that RLEA and UTU filed identical letter "protests" to CNW's original proposal, within the statutorily allocated time frame. These timely protests have been considered. In RLEA's initial pleading it requested that, in the event of approval of this application, we impose appropriate employee protective conditions. UTU evinced a desire, in its original pleading, to become a party to the protest filed by RLEA. The ALJ imposed the appropriate labor protective conditions, and our certification will be framed accordingly.

This action does not significantly affect either the quality of the human environment or energy conservation.

It is certified:

The present and future public convenience and necessity permits the abandonment by the Chicago and North Western Transportation Company of a portion of its Oelwein, IA - Randolph, MN, rail line, between milepost 496.9 near Randolph, MN, and milepost 459.0 near Dodge Center, MN, and between milepost 442 near Sargeant, MN, and milepost 354.3 near Oelwein, IA, a total distance of 125.6 miles, subject to the conditions for the protection of railroad employees discussed in Oregon Short Line R. Co. - Abandonment Goshen, 360 I.C.C. 91 (1979).

It is ordered:

1. The decision of the Administrative Law Judge, served July 15, 1981, is affirmed, as modified in this decision.

2. CNW's petition requesting the issuance of a partial abandonment certificate is granted to the extent indicated in this decision.

3. CNW's petition seeking modification of a condition imposed by the ALJ in this proceeding is granted.

4. The Minnesota Shipper Group's joint appeal is denied.

5. The late tendered letter "protests" of RLEA, BLE, and UTU are rejected.

6. Subject to the conditions imposed by the ALJ, as modified in this decision, actual abandonment may be affected by CNW after the effective date of this certificate.

7. If the abandonment is effected, tariffs applicable to this line may be canceled upon not less than 10 day's notice to the Commission. When filing schedules cancelling tariffs applicable to that line, CNW shall refer to this certificate and decision by date and docket number.

8. If the authority granted by this certificate and decision is exercised, applicant shall advise this Commission in writing, immediately after abandonment of the line of railroad, of the date on which the abandonment actually took place.

9. If the authority granted in this certificate and decision is not exercised within one year from the effective date of the certificate, it shall be of no further force and effect.

10. This decision shall be effective on the date it is served and the certificate will be effective 30 days thereafter.

By the Commisison, Chairman Taylor, Vice Chairman Clapp, Commissioners Gresham and Gilliam.

(SEAL)

JAMES H. BAYNE
Acting Secretary

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RECEIVED
DEC -7 1981
LAW DEPARTMENT
C&NW TRANSP. CO.

BROWNSDALE COOPERATIVE ASSOCIATION; CENTURY PLASTICS, INC.; FARMERS COOPERATIVE OIL ASSOCIATION; HAYFIELD DEVELOPMENT CORPORATION; HAYFIELD LUMBER COMPANY; HUNTTING ELEVATOR COMPANY, INC.; MIDLAND COOPERATIVES, INC.; MOWER COUNTY SERVICE COMPANY; NELSON'S GAS, INC.; POWER SPAN, INC.; REESE FARM CENTER, INC.; and SARGEANT GRAIN COMPANY,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Respondents.

No. 81-2332

PETITION FOR JUDICIAL REVIEW OF A DECISION
OF THE INTERSTATE COMMERCE COMMISSION

Brownsdale Cooperative Association, et al., petitioners, hereby petition for judicial review of the Certificate and Decision of the Interstate Commerce Commission in its Docket No. AB-1 (Sub-No. 113F), Chicago and North Western Transportation Company - Abandonment between Oelwein, IA and Randolph, MN, decided October 7, 1981, served October 9, 1981 (not printed), copy attached as Appendix A, insofar as such decision authorized abandonment of 19.2 miles of railroad line between Dodge Center and Sargeant, MN, and between Hayfield and Waltham, MN.

This Court has jurisdiction pursuant to 28 USC §§ 2321(a), 2342(5) and 2344. Venue lies in this Court in that the principal offices of all petitioners are located in this Circuit. 28 USC § 2343.

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Attorneys for Petitioners

December 7, 1981

EC

SERVICE DATE
OCT 9 1981

INTERSTATE COMMERCE COMMISSION

CERTIFICATE AND DECISION

Docket No. AB-1 (Sub-No. 113F)

RECEIVED
OCT 19 1981
DELIVER, MSC, S, S & H.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY--
ABANDONMENT BETWEEN OELWEIN, IA AND RANDOLPH, MN

Decided: October 7, 1981

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The Minnesota Shippers Group has simply failed to establish with any degree of specificity that service could be maintained profitably over the 19.2 mile segment in which they are interested. At hearing, and in its post-hearing brief, applicant has pointed out glaring faults in these protestants' evidence.

Protestants have taken applicant's cost and revenue and attempted to "break out" pertinent data for the 19.2 mile segment. Using this data, as adjusted for alleged inaccuracies, protestants' witness, Mr. George C. Shaffer, concluded that during the base year applicant derived net revenue of $64,872 from operation over the 19.2 mile segment. This figure was reached by subtracting branch costs of $23,802 and off-branch costs of $73,769 from revenue of $162,443. Applicant takes specific exception to this computation in only one respect. In determining on-branch costs, Mr. Shaffer developed a maintenance-of-way (M-O-W) expense of $5,304 ($279 per mile). The witness took the total M-O-W expense attributable to the entire 144.8 miles of rail line and simply apportioned it on the basis of mileage. In this manner, the witness arrived at a

$40,301 M-O-E expense for the 19.2 mile of track, and he then further apportioned that figure on the basis of the gross tons of protestants' traffic. We agree with applicant that this method significantly underestimates the M-O-W expense. An appropriate level of maintenance cannot be sustained on the basis of a $279 per mile expenditure. As applicant points out, if this segment of track is maintained, shippers and receivers on the line would have to pay the entire M-O-W expense, not just an apportionment based on tonnage; that is, using Mr. Shaffer's computations, a M-O-W expense of $40,301. Assuming protestants' other calculations are correct, this would mean that a profit of $29,875 was garnered from operations on this 19.2 mile segment during the base year. Moreover, this marginal "profit" does not take into consideration the significant opportunity costs CNW incurred on this segment, which, by protestants' own calculations, amount to $161,806.

Further, protestants fail to establish future profitability with any measure of certainty. In the circumstances present, where protestants seek continuation of service on only a small segment of a line being abandoned, past operations and expenses have very little relationship to the future.

Protestants failed to provide a complete operating plan for future service on the segment, and failed to quantify the costs for any such plan. Witness Shaffer admitted that his optimistic estimates of future traffic increases were based on unproven assertions of his shipper clients (transcript p. 581). No documentary evidence was presented to substantiate the predictions of increased business. Moreover, he acknowledged that he did not know how much money it would take to maintain this line segment in the future (transcript p. 595), and that his computations did not prove that the segment could be retained profitably.

In these premises, we agree with the ALJ that protestants have failed to satisfy their burden of proving the viability of their partial abandonment proposal.

We conclude that the appeal of the Minnesota Shippers Group should be denied, because the decision of the ALJ is correct in all material respects.

Issuance of a Partial Abandonment Certificate. - CNW has requested the immediate issuance of an abandonment certificate for all trackage involved in this application except the 19.2 mile segment which is the subject of the previously discussed appeal. That segment is also the subject of a subsidy offer filed by the Minnesota Shippers Group under 49 U.S.C. §10905.

An abandonment certificate may be issued only following the issuance of a final decision of the Commission on the merits of the proposal. See 49 U.S.C. §10904(c)(3) and 49 CFR 1121.37(b)(2)(iii). No portion of the initial decision can become final during the pendancy of a discretionary appeal. Therefore, prior to disposition of the Minnesota Shipper Group's appeal, we are precluded from issuing a partial abandonment certificate. As detailed previously, however, we are denying protestants' joint appeal in this decision. Consequently, we believe it is appropriate to issue a partial abandonment certificate in conjunction with this final decision. Because of the pending offer of financial assistance under section 10905 of the Act, however, we cannot issue a certificate covering the 19.2 mile segment of the line being considered for subsidization.

Concerning the ongoing subsidy offer, we have been requested to determine its amount and terms based on the avoidable cost of providing continued rail transportation, plus a reasonable return on the value of the line [see 49 U.S.C. §10905(f)(1)]. Our determination will be reached by October 24, 1981. Our decision in this matter will be binding upon the parties unless the sole

offeror in this proceeding withdraws its offer within 10 days. If the offer was to be withdrawn in a timely fashion, we would issue an abandonment certificate for the 19.2 mile segment as expeditiously as practicable. Of course, if our determination is accepted, a certificate would be withheld during the subsidy period.

Modification of Conditions. - CNW has requested that the 120-day public use condition imposed by the ALJ be modified to permit the removal of the track. We will agree to this proposed modification.

The environmental threshold assessment survey (ETAS) prepared by the Commission's Section of Energy and Environment recommended the imposition of a public use condition because the right-of-way would be suitable as a multipurpose trail for snowmobiling, biking, and hiking. Generally speaking, the "public use" provisions of 49 U.S.C. §10906 deal with the acquisition of rail properties for other public purposes; and, therefore, no useful purpose is served by requiring an applicant to keep rails and ties in place during the 120-day negotiating period. Consequently, since potential interest in this right-of-way involves the non-rail use of the property, the condition imposed by the ALJ will be amended to permit the removal of rail and ties. Cf. Chicago and North Western Transp. Co. - Abandonment, 354 I.C.C. 735, 740 (1978).

In certain instances, however, prospective purchasers of these properties may intend to acquire them for mass transportation or other public purposes necessitating maintenance of the track (for example, one other such public use would be conversion of the line into a scenic railway). Such a transaction would fall within the public use provisions of section 10906. Upon an affirmative showing that the existing rail line could be used for mass transportation or similar

purposes requiring retention of the track, the public use condition would provide for maintenance of rail and ties. Because the Commisison would need this information at the time it makes its determination as to whether a proposed abandonment would be required or permitted by the present or future public convenience and necessity, the information should be submitted to us within the time provided for filing comments and protests to the proceeding. Thus, information about possible mass transportation use of rail properties proposed for abandonment, requiring maintenance of rail and ties on the right-of-way, must be filed with the Commission.

Letter "protests." - Finally, the three letter "protests" submitted by the Labor interests after the service date of the ALJ's initial decision cannot be accepted. 49 U.S.C. §10904(b) and 49 CFR §1121.36(c)(1) provide that written comments and protests in abandonment proceedings must be filed within 30 days after the application is filed. Consequently, none of these pleadings was tendered in timely fashion.

We note, however, that RLEA and UTU filed identical letter "protests" to CNW's original proposal, within the statutorily allocated time frame. These timely protests have been considered. In RLEA's initial pleading it requested that, in the event of approval of this application, we impose appropriate employee protective conditions. UTU evinced a desire, in its original pleading, to become a party to the protest filed by RLEA. The ALJ imposed the appropriate labor protective conditions, and our certification will be framed accordingly.

This action does not significantly affect either the quality of the human environment or energy conservation.

It is certified:

The present and future public convenience and necessity permits the abandonment by the Chicago and North Western Transportation Company of a portion of its Oelwein, IA - Randolph, MN, rail line, between milepost 496.9 near Randolph, MN, and milepost 459.0 near Dodge Center, MN, and between milepost 442 near Sargeant, MN, and milepost 354.3 near Oelwein, IA, a total distance of 125.6 miles, subject to the conditions for the protection of railroad employees discussed in Oregon Short Line R. Co. - Abandonment Goshen, 360 I.C.C. 91 (1979).

It is ordered:

1. The decision of the Administrative Law Judge, served July 15, 1981, is affirmed, as modified in this decision.

2. CNW's petition requesting the issuance of a partial abandonment certificate is granted to the extent indicated in this decision.

3. CNW's petition seeking modification of a condition imposed by the ALJ in this proceeding is granted.

4. The Minnesota Shipper Group's joint appeal is denied.

5. The late tendered letter "protests" of RLEA, BLE, and UTU are rejected.

6. Subject to the conditions imposed by the ALJ, as modified in this decision, actual abandonment may be affected by CNW after the effective date of this certificate.

7. If the abandonment is effected, tariffs applicable to this line may be canceled upon not less than 10 day's notice to the Commission. When filing schedules cancelling tariffs applicable to that line, CNW shall refer to this certificate and decision by date and docket number.

8. If the authority granted by this certificate and decision is exercised, applicant shall advise this Commission in writing, immediately after abandonment of the line of railroad, of the date on which the abandonment actually took place.

9. If the authority granted in this certificate and decision is not exercised within one year from the effective date of the certificate, it shall be of no further force and effect.

10. This decision shall be effective on the date it is served and the certificate will be effective 30 days thereafter.

By the Commission, Chairman Taylor, Vice Chairman Clapp, Commissioners Gresham and Gilliam.

JAMES H. BAYNE
Acting Secretary

(SEAL)

PROOF OF SERVICE

I hereby certify that I have, this 7th day of December, 1981, served two copies of the foregoing petition upon all parties of record in the Interstate Commerce Commission proceeding by first-class mail, postage prepaid, and upon respondents in the following manner:

Office of the General Counsel
Interstate Commerce Commission
Washington, D. C. 20423

United States Department of Justice
Appellate Section
Washington, D. C. 20530

Thomas F. McFarland, Jr.

CO

SERVICE DATE
DEC 17 1981
RECEIVED
DEC 18 1981
LAW DEPARTMENT
C&NW TRANSP. CO.

INTERSTATE COMMERCE COMMISSION

Docket No. AB-1 (Sub-No. 113P)

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY
ABANDONMENT BETWEEN OELWEIN, IA AND RANDOLPH, MN

Decided: December 14, 1981

By petition jointly filed December 7, 1981, certain protestants[1]/ seek to stay the effective date of the abandonment certificate pending judical review. The certificate was served November 17, 1981, to take effect on December 17, 1981. A review of petitioners arguments leads me to conclude that they have not presented justification for a stay in conformity with the criteria for granting stay requests delineated in Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F. 2d 841 (D.C. Cir. 1977).

First of all, I do not find that petitioners have presented a substantial case and are, therefore, likely to prevail before the court. In addition, petitioners have not raised a serious legal question. Essentially, they raise the same argument concerning profitability of the line which was rejected in the initial decision and on appeal. In its decision served October 9, 1981, the Commission found that, using protestants' figures, the 19.2 mile line segment showed only a marginal profit of $29,875. This figure does not take into consideration the significant opportunity costs Chicago and North Western Transportation Company (CNW) incurred on the line, which by protestants' own calculations, amount to $161,806.

The opportunity cost methodology used here and in all recent abandonment proceedings is well established. In fact, petitioners do not challenge the opportunity cost calculations. Thus, petitioners do not challenge the calculations which form the basis for granting the abandonment. Under established precedent in abandonment proceedings, the contentions concerning the marginal and future profitability of the line are without merit, and do not even raise a serious legal question.

1/ Brownsdale Cooperative Association, Century Plastics, Inc., Farmers Cooperation Oil Association, Hayfield Development Corporation, Hayfield Lumber Company, Huntng Elevator Company, Inc., Midland Cooperatives, Inc., Mower County Service Company, Nelson's Gas, Inc., Power Span, Inc., Reese Farm Center, Inc., and Sargeant Grain Company.

Petitioners also allege that they will be irreparably harmed if the stay is not granted. However, the Administrative Law Judge concluded that the area has adequate motor carrier, barge and rail transportation alternatives available. While shippers on the line may experience increased transportation costs, it can not be concluded that they would suffer irreparable harm.

I also reject petitioners' contention that grant of the stay will not harm CNW. As noted above, CNW is operating a marginal line and is incurring a substantial opportunity cost and a grant of this stay would cause applicant to continue to incur this cost.

Finally, petitioners cite certain decisions of the courts of appeals granting stays pending judicial review. In response to this, I would note that the courts continue to deny stays where appropriate.[2/]

In conclusion, I find that it would be contrary to the public interest to require CNW to continue operations over the line until judicial review is completed.

It is ordered:

1. The petition for stay is denied.

2. This decision shall become effective on the date it is served.

By the Commission, Reese H. Taylor, Jr., Chairman.

Agatha L. Mergenovich
Secretary

(SEAL)

2/ Mississippi Public Service Commission, et al v. Interstate Commerce Commission and United States, No. 81-4407, Fifth Circuit, temporary stay entered November 6, 1981, stay dissolved November 19, 1981; and People of the State of Illinois, et al v. Interstate Commerce Commission and United States, Nos. 81-2520 et al., Seventh Circuit, stay denied October 29, 1981; stay denied by Circuit Justice Stevens December 1, 1981.

Office Supreme Court, U.S.
FILED
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No. 82-1579

IN THE

Supreme Court of the United States

October Term, 1982

HAYFIELD NORTHERN RAILROAD COMPANY, INC., *Appellant,*

and

STATE OF MINNESOTA, *Appellant/Intervenor,*

vs.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, *Appellee.*

On Appeal From the United States Court of Appeals for the Eighth Circuit

MOTION TO AFFIRM

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QUESTIONS PRESENTED

The questions presented are:

1. Whether 49 U.S.C. §10905 preempts Minnesota condemnation law when a Minnesota railroad company attempts to condemn the track and right of way of a properly abandoned rail line in order to continue rail service on that line.

2. Whether Hayfield Northern Railroad Company, Inc.'s attempt to condemn the subject track and right of way constitutes an impermissible collateral attack on the Interstate Commerce Commission's determination of value of the track and right of way.

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IN THE

Supreme Court of the United States

October Term, 1982

No. 82-1579

HAYFIELD NORTHERN RAILROAD COMPANY, INC.,

Appellant,

and

STATE OF MINNESOTA,

Appellant/Intervenor,

vs.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO AFFIRM

OPINIONS BELOW

The order of the Court of Appeals affirming the order of the District Court is reported at 693 F.2d 819, and appears as Appendix A to Appellants' Jurisdictional Statement (J.S. App. A-1 to A-11). The order of the District Court is not reported, and appears as Appendix C to Appellants' Jurisdictional Statement (J.S. App. A-13 to A-16).

CONSTITUTIONAL PROVISIONS INVOLVED

1. Article I, Section 8, Clause 3 of the United States Constitution provides:

> The Congress shall have Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

2. Article VI, Clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, 1941-1942 (codified at 49 U.S.C. §§10901, 10903 to 10905 (Supp. IV 1980)), are reproduced in the Appendix to Appellants' Jurisdictional Statement. 49 U.S.C. §10903 (Supp. IV 1980) appears therein as Appendix G (J.S. App. A-25 to A-26), and 49 U.S.C. §10905 (Supp. IV 1980) appears therein as Appendix F (J.S. App. A-20 to A-24).

Minn. Stat. §222.27 (1982) and Minn. Stat. §300.04 (1982) are set forth in Appellants' Jurisdictional Statement (J.S. 2 and 3, respectively).

STATEMENT

1. This is an appeal, pursuant to 28 U.S.C. §1254(2), from a decision of the United States Court of Appeals for the Eighth Circuit affirming the order of the United States District Court for the District of Minnesota which dismissed an adversary proceeding instituted by Hayfield Northern Railroad Company, Inc. (hereinafter "Hayfield Northern") against Chicago and North Western Transportation Company (hereinafter "C&NW") on the ground that 49 U.S.C. §10905 (Supp. IV 1980) preempts Minnesota condemnation law when a Minnesota railroad company attempts to condemn the track and right of way of a properly abandoned rail line in order to continue rail service on that line.

2. On January 30, 1981, C&NW filed an application with the Interstate Commerce Commission (hereinafter "Commission"), pursuant to 49 U.S.C. §10903 (Supp. IV 1980) of the Interstate Commerce Act, for a certificate of abandonment of its railroad line between Oelwein, Iowa and Randolph, Minnesota.[1] Several shippers from southern Minnesota (hereinafter the "Shippers Group") opposed the abandonment of a 19.2-mile segment of the line between Dodge Center and Sargeant, Minnesota, and between Hayfield and Waltham, Minnesota.

The Administrative Law Judge (hereinafter "ALJ") found that the public convenience and necessity permitted abandonment of the entire line.[2] Contemporaneous with the

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[1]See Chicago and North Western Transp. Co.—Abandonment Between Oelwein, Ia. and Randolph, Mn., Docket No. AB-1 (Sub-No. 113F) (1981), *petition for review dismissed sub nom.* Brownsdale Cooperative Ass'n., *et al* v. Interstate Commerce Commission and United States, No. 81-2333 (8th Cir. Jan. 14, 1982).

[2]*Id.* The ALJ's decision was decided July 10, 1981 and served July 15, 1981.

ALJ's decision, which was administratively final, the findings were published in the Federal Register[2] on July 15, 1981, which among other things, required that if continued rail service was contemplated by any person, certain procedures must be undertaken in accordance with 49 C.F.R. §1121.38 (1981).

Thereafter, the Shippers Group, pursuant to 49 U.S.C. §10905, filed an offer of financial assistance[4] to subsidize operation of the 19.2-mile segment of the line. The Commission found the Shippers Group to be financially responsible persons within the meaning of 49 U.S.C. §10905 (App. C, A-19 to A-20). When the parties could not agree on subsidy terms, the Commission found the net liquidation value of the segment of the line to be $1,791,354.[5] Shortly thereafter, the Shippers Group filed an administrative appeal of the ALJ's decision authorizing abandonment, which appeal was denied by the Commission.

Shortly after the Commission announced its findings on net liquidation value and subsidy, the Shippers Group withdrew its offer of financial assistance on the 19.2-mile segment of the line (App. E, A-33 to A-34), and filed an appeal in the United States Court of Appeals for the Eighth Circuit seeking a reversal of the ALJ's decision authorizing abandonment.[6]

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[2]46 Fed. Reg. 36,763 (No. 135) (1981) (App. A, A-1 to A-3).

[4]The Shippers Group's offer of financial assistance (App. B, A-4 to A-17) was made pursuant to 49 C.F.R. §1121.38 (1981).

[5]App. D, A-25 to A-26, A-32. It was necessary to determine net liquidation value before the subsidy amount could be calculated. The subsidy should equal "the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line . . ." 49 U.S.C. §10905(d)(2)(A). One element of the "value of the line" is the net liquidation value of the rail properties on the line. 49 C.F.R. §1121.44(c) (1981).

In early January, 1982, after unsuccessfully seeking a stay of the order authorizing abandonment, the Shippers Group withdrew its appeal in the Court of Appeals of the substantive decision authorizing abandonment.[7]

In reliance on the finality of the administrative proceedings and the absence of any offers to purchase or subsidize the 19.2-mile segment of line for continued rail operation, C&NW entered into various contracts with the State of Iowa and certain Iowa shippers involving substantial upgrading of trackage in Iowa. C&NW planned to salvage and utilize the rail from the 19.2-mile segment of the line for this purpose.

On March 31, 1982, approximately three months after the substantive appeal was dismissed, and approximately six months after the Commission's determination of net liquidation value and subsidy cost, members of the Shippers Group formed the Hayfield Northern Railroad Company, Inc., which, under Minnesota law,[8] possessed condemnation powers to acquire property for railroad purposes. On the same day, Hayfield Northern filed suit in the Dodge County (Minnesota) District Court, alleging that it desired to condemn the track, appurtenances and right of way on the 19.2-mile segment of line and seeking a temporary restraining order preventing C&NW's removal of rail, ties and facilities from the segment of line. The state court granted the restraining order.

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[6]See Brownsdale Cooperative Association, *et al* v. Interstate Commerce Commission and United States, No. 81-2333 (8th Cir. filed Dec. 7, 1981). The Shippers Group did not appeal the Commission's determination of net liquidation value or subsidy amount.

[7]*Id.* Judgment of dismissal was entered January 14, 1982.

[8]Minn. Stat. §222.27 (1982); Minn. Stat. §300.04 (1982).

C&NW removed the suit to the United States District Court for the District of Minnesota,[9] and the State of Minnesota intervened to defend the constitutionality of its condemnation statute as applied. The District Court[10] entered summary judgment in favor of C&NW, dissolved the temporary restraining order, and dismissed Hayfield Northern's complaint with prejudice, holding that, on the facts presented, 49 U.S.C. §10905 preempts state condemnation procedures (J.S. App. C, A-13 to A-16).

Hayfield Northern appealed the District Court's order[11] and moved for a stay pending appeal and for an expedited appeal. After argument, the Court of Appeals granted Hayfield Northern's motions upon the posting of a $100,000 bond.

On December 3, 1982, the Court of Appeals affirmed the judgment of the District Court (J.S. App. A, A-1 to A-11), concluding that "49 U.S.C. §10905 (Supp. IV 1980) preempts Minnesota condemnation law when a Minnesota railroad company attempts to condemn the track and right of way of a properly abandoned rail line in order to continue rail service on that line." *Hayfield Northern R.R. Co., Inc. v. Chicago and North Western Transp. Co.*, 693 F.2d 819, 820 (8th Cir. 1982) (J.S. App. A, A-1 to A-2).

Appellants' joint petitions for rehearing and rehearing en banc were denied by the Court of Appeals on January 18, 1983 (J.S. App. D, A-16 to A-17). On February 9, 1983, the Court of Appeals denied Appellants' joint peti-

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[9]Jurisdiction was based on diversity of citizenship.

[10]The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.

[11]The jurisdiction of the United States Court of Appeals for the Eighth Circuit was invoked pursuant to 28 U.S.C. §1291.

tion to stay the issuance of mandate pending appellate proceedings to this Court (J.S. App. H, A-26). On February 10, 1983, Appellants' joint application for stay of the Court of Appeals' mandate was denied by Circuit Justice Harry A. Blackmun of this Court (J.S. App. I, A-27). On February 22, 1983, Mr. Justice Rehnquist denied Appellants' renewed application for a stay of the Court of Appeals' mandate (J.S. App. J, A-28), after receiving the amicus curiae memorandum of the Solicitor General setting forth the view of the United States (J.S. App. L, A-30 to A-31). On March 7, 1983, this Court denied Appellants' renewed application for a stay of the Court of Appeals' mandate (J.S. App. K, A-29).

ARGUMENT

1. Pursuant to Rule 16 of the Rules of this Court, Appellee C&NW moves to affirm the judgment below on the ground that the Court of Appeals' decision is so eminently correct as to warrant summary affirmance by this Court.

2. In *Chicago and North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), this Court conclusively established that the Commission's authority over railroad abandonments is exclusive and plenary. A review of recent statutory changes to the Interstate Commerce Act evinces Congress' intent that the Commission also have exclusive and plenary authority over rail service continuation following the administrative authorization of abandonment.

Since the passage of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub.L. No. 94-210, 90 Stat. 31 (hereinafter "4-R Act"), the abandonment of a rail line does not merely involve the question of granting

or denying abandonment authority by the Commission, but also involves the question of disposition of the rail line following the administrative determination. In 1976, Congress was acutely aware of the inability of railroads to extricate themselves from the burden of operating unprofitable rail lines. Congress concluded that the railroad industry should not be forced to continue internalizing all losses from branch line operations and thereby further jeopardize the industry's already precarious economic health. *Chicago and North Western Transp. Co. v. United States*, 582 F.2d 1043, 1046 (7th Cir. 1978).

Under the 4-R Act, after a finding that public convenience and necessity permitted abandonment, the Commission was required to issue a certificate of abandonment unless a financially responsible person made an offer of rail service continuation assistance that would eliminate avoidable costs plus provide a reasonable return to the railroad. The parties were required to negotiate for a period not to exceed six months, and if no continuation subsidy or purchase was successfully negotiated, the Commission was required to issue a certificate of abandonment.

Unlike the provisions of the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (hereinafter "3-R Act"), applicable only to the northeastern United States, the 4-R Act had no "cram down" provision that required rail service continuation either by compulsory sale or subsidy. The 4-R Act required compulsory negotiations once a rail service continuation offer was made, but did not provide for compulsory sale or subsidy. The 3-R Act and 4-R Act abandonment provisions were the first means by which Congress dealt with the question of rail service continuation following an administrative authorization of abandonment.

During the four-year interval following the passage of the 4-R Act, the financial health of the railroad industry continued to decline. Congress found, *inter alia*, that rail industry earnings were inadequate and that there would be a $16 to $20 billion capital shortfall in the rail industry by 1985. H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 3, *reprinted in* [1980] U.S. Code Cong. & Ad. News 3978, 4111. Congress observed the deteriorating conditions of America's branch lines and found an ever increasing need for the rehabilitation and restructuring of the rail industry. *Id.*

By enacting the rail service continuation provisions of section 10905 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (hereinafter "Staggers Rail Act"), Congress intended to "assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process." H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 125, *reprinted in* [1980] U.S. Code Cong. & Ad. News 3978, 4110, 4157.

The Court of Appeals correctly recognized that the Staggers Rail Act was in part a Congressional response to protracted administrative and legal proceedings which delayed carrier abandonments and delayed the carrier's reuse of assets from abandonment lines.[12] Under section

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[12]The Commission has explicitly recognized that burdens on interstate commerce arise not only from losses sustained from operating unprofitable lines but also from the dedication of assets to operating the lines which could be used profitably elsewhere.

In Ex Parte 274 (Sub-No. 3)—Abandonment of R.R. Lines, Use of Opportunity Costs, 360 I.C.C. 571, 577 (1979), the Commission in a rulemaking proceeding concluded:

10905, any arrangements for continued rail service must be completed within 110 days. After the Commission decides to authorize abandonment, the finding is published in the Federal Register. Section 10905(c). Offers of financial assistance to subsidize or purchase must be made within 10 days of publication. *Id.* If the Commission concludes the offeror is financially responsible and the offer is adequate, issuance of a certificate of abandonment is postponed pending negotiations of the parties. Section 10905 (d). Either party may request that the Commission set the price and other terms of the sale or subsidy. Sections 10905(e), 10905(f)(1)(c). If such a request is made, the Commission must set the price and other terms within sixty days. Section 10905(f)(1)(A). The Commission's determination of value as a quasi-condemnation tribunal is binding on both parties, except that the offeror may withdraw its offer within ten days of the decision. Section 10905(f)(2). As the legislative history of the Staggers Rail Act illustrates, this abbreviated abandonment schedule was the result of the balancing of railroads' and shippers' interests by Congress.

> [W]e find that opportunity costs must be a factor used in determining whether the public convenience and necessity permits abandonment. This finding reflects our belief that opportunity costs are a real, and in some cases, very significant factor in determining whether the line at issue is imposing a burden on interstate commerce. . . . Such evidence may include the costs incurred in keeping assets tied up in less profitable uses elsewhere, including nonrail uses.
>
> • • •
>
> We believe that in the abandonment areas we must look ultimately to how productively assets are used. *Lines consisting of valuable assets may be better used elsewhere.* (Emphasis added).

See Missouri Pac. R.R. Co. v. United States and Interstate Commerce Commission, No. 79-1256 (8th Cir. March 17, 1980).

The Court of Appeals noted the abandonment provisions also demonstrate Congress' concern with the orderly operation of rail lines after their transfer under section 10905 (f). *Hayfield Northern, supra,* 693 F.2d at 822 (J.S. App. A-6 to A-7). A purchaser of a rail line under section 10905 may not transfer or discontinue service on the line for two years after the sale and may not transfer the line to anyone other than the transferor carrier for five years after the sale. Section 10905(f)(4).

A further congressional goal underlying the Staggers Rail Act was "to assist the railroads of the nation in rehabilitating the rail system in order to meet the demands of interstate commerce and the national defense." H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 3 (1980).[13]

Section 10905 of the Staggers Rail Act is comprehensive in its terms and coverage and is fashioned from a delicate balance of interests. It is clear from the legislative history of the Staggers Rail Act and its place in the development of the federal abandonment process[14] that Congress pro-

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[13]In State of Maine, Dep't. of Transp. v. Interstate Commerce Commission, 587 F.2d 541, 543-44 (1st Cir. 1978), the court considered the carrier's overall financial health as a factor to be weighed in determining whether rail service should be continued. The court stated that in weighing all the relevant factors in an abandonment, the Commission "could conclude that abandonment would bring about offsetting benefits to the financially pressed railroad, *including the ability to utilize the salvageable rails elsewhere on its line.*" *Id.* (Emphasis added). See also, *In re* Boston and Maine Corp., 596 F.2d 2 (1st Cir. 1979). Similarly, C&NW's marginal financial condition was considered by the Commission in the authorization of abandonment of the subject railroad line.

[14]In Chicago and North Western Transp. Co.—Abandonment Between Clintonville and Eland, Wis., 363 I.C.C. 975, 976 (1981), the Commission noted the extraordinary statutory scheme to preserve continued rail service.

vided section 10905 as the uniform federal method of acquiring rail lines for continued rail purposes following the administrative authorization of abandonment.

3. In affirming the District Court's order of summary judgment in favor of C&NW on the ground that Hayfield Northern's contemplated action was preempted by 49 U.S.C. §10905, the Court of Appeals properly applied the long established rule that a state law may not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of an act of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 102 S.Ct. 3014, 3022 (1982).

Article I, Section 8, Clause 3 of the United States Constitution provides "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . ." It has long been settled law that "there can be no divided authority over interstate commerce, and . . . the acts of Congress on that subject are supreme and exclusive." *Missouri Pac. R.R. Co. v. Stroud*, 267 U.S. 404, 409 (1925);

> In amending section 10905 (see section 402 of the Staggers Rail Act of 1980, Public Law 96-448), Congress established an entirely new procedure in abandonment proceedings. To ensure continued rail service where desired on lines authorized to be abandoned, Congress specifically conferred upon the Commission the power to force the abandoning rail carrier to sell the line or operate it under the subsidy . . . The statutory provisions set forth specific procedural time frames and substantive considerations to guide the Commission. Section 10905 evidences a clear congressional intent to ensure continued rail service through these extraordinary powers.

See also, Central of Georgia R.R. Co.—Abandonment, Docket No. AB-28 (Sub-No. 4) (December 17, 1982); Chicago and North Western Transp. Co.—Abandonment Between Norwood and Madison, Mn., Docket No. AB-1 (Sub-No. 142) (1983).

Chicago and North Western Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 319 (1981). The plenary power of the United States Congress over interstate commerce by virtue of Article I, Section 8, Clause 3 of the United States Constitution was recognized by this Court as early as 1824 in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

The preemption doctrine derives from the Supremacy Clause of the United States Constitution (Art. VI, cl. 2), which states:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .. any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

A state law is "contrary" to a federal statute, and is thus preempted, if the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Perez v. Campbell*, 402 U.S. 637, 649 (1971), *quoting Hines v. Davidowitz, supra*, 312 U.S. at 67-68. The determination of a state "obstacle" is a two-step process of "first ascertaining the construction of the two statutes [federal and state] and then determining the constitutional question whether they are in conflict." *Perez v. Campbell, supra*, 402 U.S. at 644. In ascertaining whether any conflict between the federal and state statutes is present, a court's concern is necessarily with "the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959).

If a federal statute reveals Congress' intent to foreclose all state legislation on the same subject, the state legisla-

tion will be deemed "contrary" to a federal statute, and thus preempted. *Fidelity Federal Savings & Loan Association, supra,* 102 S.Ct. at 3022. Congress' intent to "occupy the field" and thereby foreclose all state law on the same subject may be express, explicitly stated in the statute, or implied, implicitly contained in the statute's structure and purpose. *Id.*

Absent explicitly pre-emptive language, Congress' intent to supersede state law altogether may be inferred because '[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose." *Id.* (quoting *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Without regard to whether Congress intended to foreclose all state legislation on the same subject, "a state statute is void to the extent that it actually conflicts with a valid statute. . ." *Edgar v. MITE Corp.*, 102 S.Ct. 2629, 2635 (1982). An actual conflict of federal and state statutes may be found either

> when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

Fidelity Federal Savings & Loan Association, supra, 102 S.Ct. at 3022.

Minnesota state law, which would purport to authorize Hayfield Northern to condemn C&NW's abandoned railroad line for continued rail purposes, stands as such an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, and is thus preempted by 49 U.S.C. §10905.

By enacting section 10905, Congress intended to "assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process." H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 125, *reprinted in* [1980] U.S. Code Cong. & Ad. News 3978, 4110, 4157. This statute is carefully tailored to accomplish that purpose, and it makes provision for continued rail service an integral part of the federal abandonment process.

The elaborate procedural detail of this statutory scheme indicates that not only has Congress granted the Commission exclusive and plenary authority to regulate abandonments, *Chicago and North Western Transp. Co. v. Kalo Brick & Tile Co., supra,* 450 U.S. at 320, Congress has also granted the Commission exclusive and plenary authority to provide for continuation of rail service in connection with abandonments. *Hayfield Northern, supra,* 693 F.2d at 822 (J.S. App. A-7).

To allow Hayfield Northern to use state condemnation proceedings to condemn C&NW's right of way and track for purposes of continued rail service would frustrate the accomplishment of Congress' purpose in enacting section 10905. *Hayfield Northern, supra,* 693 F.2d at 822 (J.S.

App. A-7). For example, the benefits of the 110-day time schedule would be lost, since the state proceedings, once commenced,[15] could take years. C&NW's removal of the subject track and appurtenances was continuously restrained from March 31, 1982 to February 9, 1983. The rail from the 19.2-mile segment of line, which C&NW had planned to utilize to fulfill its contracts with the State of Iowa and certain Iowa shippers to upgrade major grain hauling lines in Iowa, has remained intact for one year beyond the time of its anticipated removal in April, 1982. As a result of the instant litigation, the rail upgrading program has been disrupted, and C&NW has been prevented from utilizing the salvageable rail and track materials elsewhere on its system. Hayfield Northern's purported state condemnation action has subjected C&NW to the precise "protracted legal proceedings" which the procedures set forth in section 10905 were clearly designed to avoid. *Hayfield Northern, supra,* 693 F.2d at 823 (J.S. App. A-7).

4. To permit Hayfield Northern to invoke state condemnation procedures to acquire the 19.2-mile segment of line would circumvent the Commission's determination of value under 49 U.S.C. §10905(f). The Court of Appeals correctly concluded that there is no reason to allow the Shippers Group, acting through Hayfield Northern, to force C&NW to re-litigate the question of value in a state court when Congress has provided an expedited method by which sale price may be determined, especially when one determination of value has already been made. *Hayfield Northern, supra,* 693 F.2d at 823 (J.S. App. A-8).

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[15]Hayfield Northern has not yet filed its condemnation action, for reasons understood by neither Appellee nor the Court of Appeals. *Hayfield Northern, supra,* 693 F.2d at 823, n. 5 (J.S. App. A-7).

The Commission's jurisdiction under section 10905(f) was invoked by the incorporators and principals of Hayfield Northern. The Commission determined, in an unappealed order, that the net liquidation value of the 19.2-mile segment of line was in excess of $1.7 million. The attempt by Hayfield Northern to invoke state condemnation proceedings in an effort to obtain an independent determination of value of the 19.2-mile segment of the abandoned line, where Congress has given the Commission authority to determine value and where the Commission has in fact determined that value, is squarely an impermissible collateral attack on the Commission's decision of value.[10] It has long been held that courts will not consider collateral attacks upon Commission orders. *See Village of Mantorville v. Chicago Great Western Ry. Co.*, 8 F.Supp. 791

[10]Hayfield Northern's resort to Minnesota condemnation law in an effort to prevent C&NW's removal of the subject track, given the Commission's decision and order expressly permitting C&NW to remove the subject track and ties, also constitutes an impermissible collateral attack on the Commission's decision. The ALJ's initial decision and order (served July 15, 1981) included a provision for C&NW to keep its real estate, bridges, culverts and track intact for 120 days after the effective date of the decision in order for public acquisition to take place (pursuant to 49 U.S.C. §10906). C&NW thereafter petitioned the Commission for modification of the terms of the public use condition to exclude "track", since such was not properly included. In its decision and order served October 9, 1981, the Commission granted C&NW's petition to specifically "permit the removal of rail and ties." See Chicago and North Western Transp. Co.—Abandonment Between Oelwein, Ia. and Randolph, Mn., Docket No. AB-1 (Sub-No. 113F) (Certificate and Decision decided October 7, 1981, served October 9, 1981). The Commission's modification of the ALJ's decision to permit C&NW's removal of rail and ties was explicitly made a part of the Commission's order in connection with the abandonment proceedings. *Id.* This explicit Commission authorization and order permitting C&NW to remove its track was not appealed by the Shippers Group.

(D.Minn. 1934). *See also, Chicago and North Western Transp. Co. v. Kalo Brick & Tile Co., supra.*

The sole method for attacking a final order or determination of the Commission is by appeal to the appropriate federal court of appeals, pursuant to 28 U.S.C. §2321(a). *See Ex Parte 274 (Sub-No. 6), Abandonment of Railroad Lines and Discontinuance of Service* (49 C.F.R. Part 1121), 365 I.C.C. 249, 261 (1981).

Those who seek to avoid the federal requirements applicable to continued rail service when acquiring lines, as set forth in section 10905(f)(4), or who do not agree with the Commission's determination of value but who choose not to appeal such determination of value, cannot be allowed to proceed under the diverse jurisdictions of the 50 states of the United States where, as here, Congress has determined that continued rail service after the Commission's determination of abandonment is part and parcel of the federal abandonment process.

Hayfield Northern does not, in so many words, seek to annul or modify the Commission's orders, but rather bases its action on its purported power of eminent domain to acquire C&NW's track and real estate. However, the indisputable and ultimate effect of the state condemnation action is to require C&NW to re-litigate the question of value in a state court when Congress has provided an expedited method to determine sale price, and where the Commission has already determined the value of the subject property. Such a result clearly runs counter to the well-settled law in the District of Minnesota:

> The fact that such order of the Commission may run counter to a state statute, a municipal ordinance, or even a charter provision, is no impediment to the Commission's exclusive and plenary jurisdiction to

> regulate interstate commerce. The fact that the order is termed permissive and not mandatory does not give a state or a municipality the right to proceed in abrogation of the Commission's findings and order, and it is now uniformly recognized that, under the Transportation Act of 1920 (Interstate Commerce Act §1 (18-20), 49 USCA §1 (18-20)), the Interstate Commerce Commission has exclusive power to authorize the abandonment of all or a portion of a line of railroad used in interstate commerce.

Village of Mantorville v. Chicago, Great Western Ry. Co., supra, 8 F.Supp. at 794.

Hayfield Northern's contemplated condemnation action unmistakeably constitutes collateral attacks on the Commission's unappealed determination of value and order permitting removal of the subject track, and this Court should summarily affirm the judgment of the Court of Appeals.

5. The questions presented by this case do not justify further briefing and oral argument before this Court. The Court of Appeals' conclusion that Congress had granted the Commission exclusive and plenary authority to provide for rail continuation in connection with abandonments was a logical extension of this Court's decision in *Chicago and North Western Transp. Co. v. Kalo Brick & Tile Co., supra,* which held the Commission had exclusive and plenary authority over abandonment of rail lines. Appellants' protestations to the contrary notwithstanding, the Court of Appeals' decision is not inconsistent with any decision of another federal court of appeals or this Court.[17]

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[17]Appellants incorrectly state that the Court of Appeals' decision conflicts with Chicago and North Western Transp. Co. v. United States, 678 F.2d 665 (7th Cir. 1982), and Simmons v. Interstate Commerce

Appellants' attempt to buttress their argument by relying on nonauthoritative internal memoranda of the Commission concerning section 10905 is also misplaced. The position of the Commission was to not intervene in this case because the Commission's jurisdiction and responsibilities are not threatened or adversely affected by this litigation (J.S. App. L, A-30). The Commission's decision to not intervene in this case was appropriate, as the matter of statutory construction of the recently enacted Staggers Rail Act properly rests with the courts.[18] The District Court and the Court of Appeals have fully considered Appellants' proffered construction of the Staggers Rail Act and have correctly rejected the same.

Commission, 697 F.2d 326 (D.C. Cir. 1982). The Court of Appeals in the above-entitled action concluded that the dictum of the Seventh Circuit Court of Appeals in Chicago and North Western Transp. Co. v. United States, *supra*, "does not show that the Seventh Circuit, on full briefing and consideration, would hold that state condemnation laws are consistent with the purpose of [49 U.S.C.] §10905." *Hayfield Northern, supra*, 693 F.2d at 824 (J.S. App. A-11). Appellants' reliance upon *Simmons, supra*, is similarly misplaced. In *Simmons*, the Court of Appeals for the District of Columbia Circuit concluded only that the Interstate Commerce Commission had authority, under 49 U.S.C. §10505(a) (Supp. IV 1980), to exempt states from labor protection provisions of the Interstate Commerce Act. 697 F.2d at 328.

Appellants' contention that the Court of Appeals' decision conflicts with the Tenth Amendment and National League of Cities v. Usery, 426 U.S. 433 (1976), was not raised by Appellants in the District Court or on appeal from the District Court's decision to the Court of Appeals. Rather, this contention was raised for the first time in Appellants' Joint Petition for Rehearing and Joint Petition for Rehearing En Banc to the Court of Appeals. Appellee's reference to this contention is neither intended nor understood to constitute Appellee's acknowledgement or consent that this contention is properly before this Court.

[18]The General Counsel of the Commission recommended that the Commission not intervene in this action because "[t]he federal district court undoubtedly is aware of the doctrine of preemption and can reach the correct result without the Commission's participation" (J.S. App. N, A-47).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
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No. 82-1579

IN THE

Supreme Court of the United States

October Term, 1982

HAYFIELD NORTHERN RAILROAD COMPANY, INC., *Appellant,*

and

STATE OF MINNESOTA, *Appellant/Intervenor,*

vs.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, *Appellee.*

On Appeal From the United States Court of Appeals for the Eighth Circuit

APPENDIX TO MOTION TO AFFIRM

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APPENDIX

APPENDIX A

46 Fed. Reg. 36,763 (No. 135)
Wednesday, July 15, 1981

[No. AB-1 (Sub-No. 113)F]

Chicago and North Western Transportation Company—Abandonment Between Oelwein, IA and Randolph, MN; Findings

July 10, 1981.

Notice is hereby given pursuant to 49 U.S.C. 10903 that by a decision decided July 10, 1981, a finding, which is administratively final, was made by the Administrative Law Judge stating that, the public convenience and necessity permit the abandonment by The Chicago and North Western Transportation Company of a line of railroad extending from railroad milepost 354.3 near Oelwein, IA to milepost 457.2 near Dodge Center, MN, from milepost 459.0 north of Dodge Center to milepost 496.9 near Randolph, MN, and from milepost 1.2 at Hayfield, MN to milepost 5.2 at Waltham, MN, a total of 144.8 miles traversing Fayette, Bremer, Chickasaw, Howard and Mitchell Counties in Iowa, and Mower, Dodge, Goodhue, Rice and Dakota Counties in Minnesota. Abandonment is subject to the conditions for the protection of employees discussed in *Oregon Shortline Railroad Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). A certificate of abandonment will be issued to The Chicago and North Western Transportation Company based on the above-described finding, 30 days after publication of this notice, unless within 15 days from the date of publication, the Commission further finds:

(1) a financially responsible person (including a government entity) has offered financial assistance (in the form of a rail service continuation payment) to enable the rail service involved to be continued. The offer must be filed with the Commission and served concurrently on the applicant, with copies to Mrs. Ellen Hanson, Room 5417, Interstate Commerce Commission, Washington, DC 20423, no later than 10 days from publication of this Notice; and

(2) It is likely that such proffered assistance would:

(a) Cover the difference between the revenues which are attributable to such line of railroad and the avoidable cost of providing rail freight service on such line, together with a reasonable return on the value of such line, or

(b) Cover the acquisition cost of all of any portion of such line of railroad.

If the Commission so finds, the issuance of a certificate of abandonment will be postponed. An offer may request the Commission to set conditions and amount of compensation within 30 days after an offer is made. If no agreement is reached within 30 days of any offer, and no request is made of the Commission to set conditions or amount of compensation, a certificate of abandonment will be issued no later than 50 days after notice is published. Upon notification to the Commission of the execution of an assistance or acquisition and operating agreement, the Commission shall postpone the issuance of such a certificate for such period of time as such an agreement (including any extensions or modifications) is in effect. Information and procedures regarding the financial assistance for continued rail service or the acquisition of the involved rail line are contained in 49 C.F.R. §1121 as revised by Ex Parte No.

274 (Sub-No. 6), *Abandonment of Railroad Lines and Discontinuance of Service*, 45 FR 75144 (November 25, 1980). All interested persons are advised to follow the instructions contained therein as well as the instructions contained in the above-referenced decision.

Agatha L. Mergenovich,
Secretary.

APPENDIX B

BEFORE THE
INTERSTATE COMMERCE COMMISSION

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—ABANDONMENT BETWEEN OELWEIN, IOWA AND RANDOLPH, MINNESOTA

Docket No. AB-1
(Sub-No. 113F)

OFFER OF FINANCIAL ASSISTANCE RELATING TO PORTIONS OF LINE BETWEEN MILEPOSTS 442 AND 457.2 AND BETWEEN MILEPOSTS 1.2 AND 5.2

BROWNSDALE COOPERATIVE ASSOCIATION
CENTURY PLASTICS, INC.
FARMERS COOPERATIVE OIL ASSOCIATION
MIDLAND COOPERATIVES, INC.
MOWER COUNTY SERVICE COMPANY
POWER SPAN, INC.
REESE FARM CENTER, INC.
Offerors

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Of Counsel
Due Date: July 24, 1981

STATEMENT OF THE CASE

On January 30, 1981, Chicago and North Western Transportation Company (C&NW) filed an application for authority to abandon its line of railroad between Oelwein, Iowa and Randolph, Minnesota.

An investigation was instituted into the proposed abandonment. Hearings were held at Oelwein, Iowa on May 5-8, 1981.

Among the parties protesting the proposed abandonment in whole or in part was a group of shippers and receivers located on those portions of C&NW's line between Dodge Center and Sargeant, Minnesota (Mileposts 442-457.2), and between Hayfield and Waltham, Minnesota (Mileposts 1.2-5.2). That group includes the parties making this offer of financial assistance.

That group of Minnesota shippers opposed the proposed abandonment insofar as it included the 19.2-mile segment of line on which they are located. Those shippers introduced evidence that operation of that segment was

profitable to C&NW in the base year, and would be even more profitable in the immediate future. C&NW did not attempt to rebut that evidence.

In an initial decision served July 15, 1981, Administrative Law Judge (ALJ) Paul J. Clerman found that the proposed abandonment should be authorized in full. The ALJ summarized the evidence of the Minnesota shippers at page 13 and Appendix E of the initial decision, but he concluded that their proposal was not drawn with sufficient detail to permit comprehensive analysis as to profitability (page 23).

The findings of the initial decision were published in the *Federal Register* of July 15, 1981. Pursuant to interim rules adopted in Ex Parte No. 274 (Sub-No. 6), *Abandonment of Railroad Lines and Discontinuance of Service*, 45 FR 78144 (Nov. 25, 1980), offers of financial assistance for continued operation of the line, if any, must be filed on or before Friday, July 24, 1981.

Administrative appeals of the initial decision, if any, must be filed on or before August 4, 1981.

FOREWORD

The Minnesota shippers filing this offer of financial assistance intend to subsidize continued operation of the 19.2-mile segment of line only in the event that the Commission's final decision is that abandonment of that segment is permitted by public convenience and necessity. Depending upon the Commission's decision in that respect, judicial review of that decision may also be sought. Consequently, those shippers intend to pursue their administrative remedy with respect to the merits of the initial decision relating to that segment and, if necessary and appropriate,

the shippers will also pursue their judicial remedy in that respect.

However, the Commission's current practice of publishing the findings of its initial decisions authorizing abandonments in the *Federal Register* as notice of the opportunity to offer financial assistance as to the involved lines, as if such initial decision findings were final Commission findings, requires potential offerors to make "protective" offers of financial assistance, such as this offer, before pursuing their legal remedies on the merits of the abandonments. That is so because otherwise the 10-day deadline for offering financial assistance arguably would have expired by the time review of the merits of the abandonment had been completed. In our view, that practice clearly violates 49 USC §10905(c), read together with 49 USC §10904(c)(3).

In any event, this offer of financial assistance is filed pursuant to 49 CFR §1121.38 (interim), as interpreted in *Illinois Central Gulf Railroad Company—Abandonment—between Herscher and Barnes in Kankakee, Ford, Livingston, and McLean Counties, IL*, Docket No. AB-43 (Sub-No. 43), decided April 28, 1981 (not printed).

The offerors seek a finding that they are financially responsible persons who have made an adequate offer of financial assistance for continued operation of the 19.2-mile segment of line in Minnesota.

OFFER OF FINANCIAL ASSISTANCE

Pursuant to 49CFR §1121.38(c)(2) (interim), Brownsdale Cooperative Association; Century Plastics, Inc.; Farmers Cooperative Oil Association; Midland Cooperatives, Inc.; Mower County Service Company; Power Span,

Inc.; and Reese Farm Center, Inc. hereby offer financial assistance for continuation of rail service on the 19.2-mile segment of C&NW's line between Dodge Center and Sargeant, Minnesota (Mileposts 442-457.2), and between Hayfield and Waltham, Minnesota (Mileposts 1.2-5.2), and make the following showing in support of such offer:

49 CFR §1121.38(c)(2)(i)

Offer and Proposed Subsidy Payment

The offer of financial assistance is to subsidize continued operation over the 19.2-mile segment during the subsidy period. The offer contemplates that such subsidy would consist of payment for (1) the excess of avoidable costs of operating the line segment over the revenues attributable thereto, if any, based upon actual operations conducted during the subsidy period; (2) administrative costs based upon one percent of the actual revenues attributable to the line segment during the subsidy period; and (3) a reasonable return on the value of the line segment—all as determined pursuant to the methodology for subsidy calculations contained in 49 CFR Part 1121, Subpart D. See decision of April 28, 1981 in Docket No. AB-43 (Sub-No. 43), *supra*, pp. 5-6.

The following proposed subsidy payment is submitted for illustrative purposes only. It shows the subsidy which would have been required if subsidized operations over the line segment had been conducted during the base year ended July 31, 1980. See decision of April 28, 1981 in Docket No. AB-43 (Sub-No. 43), *supra*, page 6. The source of the data for the calculation of the payment is the unrebutted evidence of Witness George C. Shaffer in the abandonment proceeding, Exhibit 18, modified, as neces-

sary, by the findings of ALJ Clerman in the initial decision. The foremat for illustration of the estimated subsidy is that contained in the appendix to the decision of April 28, 1981 in Docket No. AB-43 (Sub-No. 43), *supra*. The basis for the calculations is briefly explained following the illustration of the payment:

Proposed Subsidy Payment
Mileposts 442-457.2 and 1.2-5.2

Base Year Operations—Illustrative Purposes Only

1.	Revenues			$162,443
2.	Avoidable Costs			73,769
	a. Off-branch			
	b. On-branch			
	1. Maint.-way	$	5,304	
	2. Maint.-equip.		1,514	
	3. Transp.		10,990	
	4. Deadheading		150	
	5. Car Cost		3,953	
	6. Return-loco.		1,892	23,802
3.	Total Avoidable Cost			$ 97,571
4.	Return on Value			
	a. Working Capital	$	978	
	b. Net Liquidation Value		1,739,848	
	c. Total Valuation		1,740,826	
	d. Rate of Return		9.3%	
	e. Return on Value			161,897
5.	Administrative Costs (1% of revenues)			1,624
6.	Estimated Subsidy Payment (Line 1 minus Lines 3, 4e and 5)			$ 98,649

The revenues shown on line 1 of the above calculation are the actual C&NW revenues derived from 217 carloads of traffic originated or terminated on the 19.2-mile segment in the base year (Ex. 18, p. 14; initial decision, p. 13).

Off-branch costs shown on line 2a of the calculation are Rail Form A off-branch costs for those 217 carloads as applied by C&NW, except that the costs for switching at the Dodge Center junction are C&NW's Rail Form A costs for inter/intra train switching, rather than modified terminal costs used by C&NW (Ex. 18, pp. 11-12; initial decision, p. 13).

On-branch costs shown on line 2b of the calculation are based on actual costs developed by C&NW, prorated and allocated to those 217 carloads of traffic on the basis of gross ton-miles, car-miles and car-days (Ex. 18, p. 13; initial decision, p. 13).

Total avoidable costs shown on line 3 are the sum of off-branch costs and on-branch costs shown on lines 2a and 2b, respectively.

Return on value shown on line 4e was derived by applying a rate of return of 9.3 percent (line 4d) to the sum (line 4c) of working capital and the net liquidation value of the line segment (lines 4a and 4b, respectively). The rate of return is that used in the decision of April 28, 1981 in Docket No. AB-43 (Sub-No. 43), *supra*, p. 10. Working capital on line 4a was computed at 15 days of on-branch cash avoidable costs in the base year. *Id*, p. 7. In that respect, Witness Shaffer incorrectly estimated working capital on the basis of a mileage prorate to the 19.2-mile segment of working capital assigned to the entire line by C&NW (Ex. 18, p. 15). Net liquidation value was determined by adding (1) the land value in the 19.2-mile seg-

ment on the basis of a mileage prorate to that segment of total land value for the entire line, and (2) the net salvage value of the actual track materials in the segment as valued by C&NW; however, that net salvage value was adjusted downward on the basis of the reduced values of usable rail found in the initial decision (Ex. 18, p. 15, Ex. GCS-4; initial decision, pp. 10-11, 19).[1]

Administrative costs on line 5 represent one percent of the actual revenues on segment traffic in the base year. See decision of April 28, 1981 in Docket No. AB-43 (Sub-No. 43), *supra*, p. 10.

The estimated subsidy payment on line 6 represents the amount by which the return on value of the line plus administrative costs exceed the operating profit achieved in the base year. Once again, it is emphasized that the above calculation is an illustration of the subsidy methodology, not an offer to pay a specific dollar amount of subsidy. See decision of April 28, 1981 in Docket No. AB-43 (Sub-No. 43), *supra*, p. 11.

49 CFR §1121.38(c)(2)(ii)

Authorization to Execute and Fulfill Agreement to Subsidize

Each of the seven companies filing this offer of financial assistance has corporate authority to execute and to fulfill

[1]Witness Shaffer valued all usable rail at $312.90 per ton, on the basis of C&NW's valuation (Ex. 18, Ex. GCS-4, p. 2). The initial decision found that usable 115-pound rail should be valued at $275 per ton; usable 112-pound rail should be valued at $270 per ton; usable 100-pound rail should be valued at $235 per ton; and usable 90-pound rail should be valued at $225 per ton (initial decision, pp. 10, 19). The resulting recalculation reduces the gross value of rail in the 19.2-mile segment by $207,548, and correspondingly reduces the net liquidation value of that segment from $1,947,396, as testified by Witness Shaffer, to $1,739,848.

an agreement to subsidize continued operation of the 19.2-mile segment of rail line. Appendix 1 to this offer consists of written resolutions and/or authorizations to that effect.

49 CFR §1121.38(c)(2)(iii)

Information Relating to Sufficiency of Financial Resources for Subsidy

Appendices 2 and 3 to this offer consist of recent balance sheets and profit and loss statements, respectively, for six of the seven companies joining in this offer of financial assistance. (Similar documents for the seventh company, Midland Cooperatives, Inc., were not available in the short period of time within which this offer must be made.) It is submitted that those financial statements demonstrate the sufficiency of the financial resources of those companies to provide subsidy payments of the magnitude shown in the illustration of estimated subsidy payment for continued operation of the 19.2-mile segment. In addition, the following information is submitted in support of the sufficiency of the financial resources of those companies.

Brownsdale Cooperative Association is a farm supply cooperative with principal place of business located at Brownsdale, Minnesota. It has approximately 800 farmer member-stockholders. At Brownsdale, the Association owns offices, a grain elevator, a fertilizer blending plant and a feed facility. It also owns a fertilizer blending plant located at Waltham, Minnesota. The gross sales of Brownsdale Cooperative Association were approximately $9.2 million in 1980.

Century Plastics, Inc. is engaged in the manufacture and

sale of corrugated drainage tubing for agricultural use at Hayfield, Minnesota. The company owns a 5,400 square-foot warehouse and a 4,900 square-foot production facility. Those facilities have been located at Hayfield since 1972. The gross sales of Century Plastics, Inc. were approximately $2 million in 1980.

Farmers Cooperative Oil Association is a farm supply cooperative organized in 1924. It has approximately 800 farmer member-stockholders. Its principal place of business is located at Hayfield, Minnesota. There it owns a service station, office, warehouse, fertilizer plant and bulk petroleum facility. The gross sales of Farmers Cooperative Oil Association were approximately $3.2 million in 1980.

Midland Cooperatives, Inc. is an association of farm cooperatives with its principal place of business located at Minneapolis, Minnesota. Midland supplies fertilizer, seed chemicals, petroleum, LP gas, hardware and feed to farm cooperatives in the Midwest. It also manufactures liquid fertilizer. Midland owns a liquid fertilizer manufacturing plant at Hayfield, Minnesota.

Mower County Service Company is a farmer-owned cooperative engaged in the retail sale of fertilizer, chemicals, petroleum products, feed and hardware to farmers in Mower County, Minnesota. The company has been in existence for approximately 10 years, and has between 800 and 1,000 farmer member-shareholders. At Sargeant, Minnesota, the company owns a general office, hardware store, warehouses for chemicals, feed and petroleum, service stations, a petroleum plant and fertilizer plants. At Waltham, Minnesota, the company owns a petroleum product service station. At Adams, Minnesota, the company owns a service station, bulk petroleum plant, feed warehouses and a fertilizer plant and

warehouse. The gross sales of Mower County Service Company were approximately $5 million in 1980.

Power Span, Inc. is engaged in the business of manufacturing pre-stressed concrete poles used for electrical power transmission. Its manufacturing facility is located at Hayfield, Minnesota. Power Span's plant in Hayfield was purchased in late 1979 for in excess of $4 million. Power Span employs approximately 75 persons at Hayfield.

Reese Farm Center, Inc. is engaged in the retail sale of agricultural supplies. It also leases farm land and plants and harvests grain. Reese farms 1,830 acres of leased land in the area of Hayfield, Minnesota. At Hayfield, Reese owns an office building, fertilizer mixing and storage warehouse, machine shed and feed warehouse, a flat grain storage building with capacity of 125,000 bushels, a shop, a chemical warehouse, two bulk agricultural chemical tanks and nine liquid fertilizer tanks. Reese also owns a seed storage facility, a grain dryer and grain storage bins with capacity of 73,000 bushels at that location. The gross sales of Reese Farm Center, Inc. were $2,054,000 in 1980.

Collectively, the seven companies offering financial assistance in this proceeding are properly characterized as financially responsible. As demonstrated above, their collective ownership of assets is very extensive, and their 1980 gross sales number in the tens of millions of dollars. There is no question that they could adequately fund an estimated subsidy payment of the magnitude of that shown in the illustration above.

49 CFR §1121.38(c)(2)(iv)

Adequacy of Offer to Cover Avoidable Loss Plus Reasonable Return on Value

As demonstrated in detail in the response to 49 CFR §1121.38(c)(2)(i), this offer is specifically designed to cover the avoidable loss incurred in operating the 19.2-mile segment of line in the subsidy period, if any, plus administrative costs and a reasonable return on the value of that segment, all as determined pursuant to the methodology prescribed in 49 CFR §1121, Subpart D. The illustration of estimated subsidy payment if operation of that segment had been subsidized in the base year provides an "order of magnitude" of the extent of this offer. It is recognized, however, that the actual subsidy during the subsidy period will depend upon the results of operations during that period. That concept is consistent with the decision of April 28, 1981, in Docket No. AB-43 (Sub-No. 43), *supra*.

49 CFR §1121.38(c)(2)(v)

Carrier's Estimated Subsidy

C&NW has not provided an estimate of the amount of subsidy which would be required to continue rail service on the 19.2-mile segment.

49 CFR §1121.38(c)(3)(i)

Current Balance Sheets

Appendix 2 to this offer contains the following balance sheets:

Brownsdale Cooperative Association — as of May 31, 1981

Century Plastics, Inc. — as of June 30, 1981

Farmers Cooperative Oil Association — as of June 30, 1981
Midland Cooperatives, Inc. — not available as of filing of offer
Mower County Service Company — as of July 31, 1980 (with explanatory letter of July 23, 1981)
Power Span, Inc. — as of March 31, 1981 (with explanatory letter of July 23, 1981)
Reese Farm Center, Inc. — as of May 31, 1981

49 CFR §1121.38(c)(3)(ii)
Profit and Loss Statements

Appendix 3 to this offer contains the following profit and loss statements:

Brownsdale Cooperative Association—years ended July 31, 1980, July 31, 1979 and July 31, 1978
Century Plastics, Inc. — years ended January 31, 1981, January 31, 1980 and January 31, 1979; February 1, 1981 through June 30, 1981
Farmers Cooperative Oil Association — six months ended June 30, 1981 and six months ended June 30, 1980
Midland Cooperatives, Inc. — not available at time offer filed
Mower County Service Company — years ended July 31, 1980 and July 31, 1979
Power Span, Inc. — year ended December 31, 1980
Reese Farm Center, Inc. — not available at time offer filed

49 CFR §1121.38(c)(3)(iii)
Additional Information

No additional information is submitted.

CONCLUSION — REQUESTED FINDING

WHEREFORE, offerors respectfully request that the Commission find that they are a financially responsible person(s) who has submitted an adequate offer of financial assistance with respect to the 19.2-mile line segment identified herein.

Respectfully submitted,

BROWNSDALE COOPERATIVE ASSOCIATION
CENTURY PLASTICS, INC.
FARMERS COOPERATIVE OIL ASSOCIATION
MIDLAND COOPERATIVES, INC.
MOWER COUNTY SERVICE COMPANY
POWER SPAN, INC.
REESE FARM CENTER, INC.
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July 24, 1981

APPENDIX C

INTERSTATE COMMERCE COMMISSION DECISION

No. AB-1 (Sub-No. 113 F)
CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY—ABANDONMENT
—BETWEEN OELWEIN, IA AND
RANDOLPH, MN.

IN THE MATTER OF AN OFFER
OF FINANCIAL ASSISTANCE
Decided: July 29, 1981

By initial decision served July 15, 1981, an Administrative Law Judge approved the abandonment of this 144.8 mile line. The findings were published in the *Federal Register* of July 15, 1981. An offer has been filed by a group of Minnesota shippers to subsidize continued operation of the 19.2 mile segment of the line between Dodge Center and Sargent, MN and between Hayfield and Waltham, MN, if the abandonment is ultimately approved.

The shippers include:

(1) Brownsdale Cooperative Association, a farm supply cooperative at Brownsdale, MN, which had 1980 gross sales of $9.2 million;

(2) Century Plastics, Inc., a manufacturer and seller of corrugated drainage tubing at Hayfield, MN, which had gross sales of $2 million in 1980;

(3) Farmers Cooperative Oil Corporation, a farm supply cooperative at Hayfield, MN, which had gross sales of $3.2 million in 1980;

(4) Midland Cooperative, Inc., an association of farm cooperatives at Minneapolis, MN (financial information was not filed for this company);

(5) Mower County Services Company, a farmer-owned cooperative at Mower County, MN, which had gross sales of $5 million in 1980;

(6) Power Span, Inc., a manufacturer of pre-stressed concrete poles at Hayfield, MN, which purchased its plant at Hayfield, MN in late 1979 for more than $4 million; and

(7) Reese Farm Center, Inc. at Hayfield, MN, a retail seller of agricultural supplies, which had 1980 gross sales of $2,054,000.

The shippers offer to pay for (1) the excess of avoidable costs of operating the line segment over the revenues attributable to it, based upon actual operations conducted during the subsidy period; (2) the administrative costs based upon one percent of the actual revenues attributable to the line segment during the subsidy period and (3) a reasonable return on the value of the line segment, all as determined by the methodology contained in 49 CFR 1121, Subpart D. Under their methodology, the shippers calculated that the subsidy would have amounted to $98,649 for the base year period ending July 31, 1980.

The shippers have offered a reasonable methodology for calculating the subsidy, in accordance with our guidance in AB-43 (Sub-No. 43), *Illinois Central Gulf R. Co.—Abandonment* 363 I.C.C. 866 (1981).

I find:

1. The shippers are financially responsible persons who have offered financial assistance to enable rail transporta-

tion to be continued over a part of the railroad line to be abandoned.

2. It is likely that the assistance would be equal to the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line.

3. The issuance of the abandonment certificate should be postponed to allow the parties to enter into an agreement to permit continuation of rail service over the line.

4. This decision does not significantly affect the quality of the human environment or energy consumption.

It is ordered:

1. The issuance of a certificate authorizing abandonment is postponed. The offerors may request the Commission to set conditions and amount of compensation on or before August 21, 1981. If no agreement is reached, and no request is made on the Commission to set conditions or amount of compensation, a certificate of abandonment will be issued if the initial decision, authorizing abandonment is approved by the Commission. Upon notification to the Commission of the execution of an assistance or acquisition and operating agreement, the Commission shall postpone the issuance of the certificate for such period of time as the agreement (including any extensions or modification)

is in effect. See 49 U.S.C. §10905, *as amended* by §402 of the Staggers Rail Act of 1980, Pub. L. 96-448.

2. This decision is effective on the date it is served.

By the Commission, Gary J. Edles, Director, Office of Proceedings.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

APPENDIX D

INTERSTATE COMMERCE COMMISSION DECISION

Docket No. AB-1 (Sub-No. 113F)
CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY—ABANDONMENT
BETWEEN OELWIN, IOWA, AND
RANDOLPH, MN

REQUEST TO ESTABLISH
CONDITIONS AND COMPENSATION
Decided: October 16, 1981

By decision served July 15, 1981, Administrative Law Judge (ALJ) Paul J. Clerman, approved the application of the Chicago and North Western Transportation Company (CNW) to abandon 144.8 miles of rail line in Fayette, Bremer, Chickasaw, Howard, and Mitchell Counties, IA and Mower, Dodge, Goodhire, Rices, and Dakota Counties, MN. The findings were published in the *Federal Register* on July 15, 1981.

The Brownsdale Cooperative Association, Century Plastics, Inc., Farmers Co-operative Oil Association, Midland Cooperatives, Inc., Mower County Service Company, Power Span, Inc., and Reese Farm Center, Inc. (Shippers Group) filed an offer to subsidize continued operation of 19.2 mile line segment between Dodge Center, (milepost 457.2) and Sargeant, MN (milepost 442.0) and between Hayfield (milepost 1.2) and Waltham, MN, milepost 5.2).

On July 30, 1981, the Director of the Office of Proceedings determined that the Shippers Group was a financially

responsible person making an adequate offer of financial assistance and postponed the issuance of the abandonment certificate pending the negotiations between the Shippers Group and CNW. On August 21, 1981, the Shippers Group asked us to establish the conditions and compensation for financial assistance, pursuant to 49 U.S.C. 10905.

Procedural Matter

The Shippers Group criticizes our procedures and time frames for financial assistance proceedings. It argues that *Federal Register* publication of our findings granting abandonment should not occur until our decision has become administratively final—30 days after issuance of the initial decision. It believes that if an appeal is not filed or not considered, publication can occur 30 days after service of the initial decision. But, if an appeal is filed and entertained, it believes no publication can occur before we have disposed of such an appeal.

We disagree with this interpretation. Section 10905 requires that: (1) the service of the initial abandonment decision on the parties and publication be concurrent; (2) the offer of financial assistance be made within 10 days of publication; (3) our findings concerning the financial responsibility of the offeror and the adequacy of the offer be made within 15 days of publication; and (4) the carrier or the financially responsible party request us to set conditions and amount of compensation within 30 days after the offer is made. The filing of an appeal does not interrupt this sequence of events. A subsidy offer must be filed before there has been a determination of whether an appeal will be entertained. See *Abandonment of R. Lines & Discontinuance of Serv.*, 365 I.C.C. 249, 257 (1981).

Discussion and Conclusion

49 U.S.C. 10905(f)(1)(B) provides that "the Commission shall determine the amount and terms of subsidy based upon the avoidable cost of providing continued rail transportation plus a reasonable return on the value of the line." Avoidable costs during the subsidy year will depend upon, among other factors, traffic levels, maintenance requirements, and the rate of inflation in the subsidy year. As we indicated in *Illinois Central Gulf, -R. Co.*, 363 I.C.C. 866 (1981), *(Bloomer Line)*, our objective is to assure that a subsidy determination bears a direct relationship to actual costs and to assure that *all* risks of unprofitable operations will be on the subsidizer. To do this, we have prescribed a methodology to be used in the calculation which will properly compensate the railroad for operations. This methodology is found at 49 C.F.R. 1121, subpart D. Our decision here will only illustrate how the methodology should be applied in those areas which are disputed.

In their projections of future subsidization costs, the parties differ on the following items: (1) net liquidation value; (2) rate of return; (3) on-branch costs for maintenance of way and structures; (4) the casualty reserve account; and (5) administrative costs. These disputed items, as well as the Shippers Group's concerns about frequency of service, are discussed below.

Net Liquidation Value. The amount of the subsidy is based, in part, upon a reasonable return on the value of the line. This is calculated by applying a reasonable rate of return on an investment base comprised of three elements: working capital; income tax benefits; and net liquidation value. There appears to be no dispute on the working capital and since CNW does not pay taxes, there are no income tax benefits.

The Shippers Group maintains that the proper net liquidation value of the line segement (sic) is $1,527,320. This figure is based on a land value of $195,098 plus net salvage value of track materials of $1,332,222. CNW proposes a figure of $1,791,354 which is based on land value of $252,000 plus net salvage value of track materials of $1,539,354.

Land value—The Shippers Group states that the $195,098 value it placed on the land is based on $827 per acre and a total acreage of 235.91. CNW's land value of $252,000 is based on an average of $1,142 per acre on the 185.52 acres for the line between Dodge Center and Sargeant, and an average of $794 per acre on the 50.39 acres between Hayfield and Waltham. The offeror argues that CNW's figure is based upon the highest and best use *for rail purposes*. CNW disputes this claim.

It appears that CNW followed the methodology provided in the regulations. It supplied data based upon the testimony of an expert witness. Since CNW took into account factors which could affect valuation, such as questionable titles, and made adjustments for size, shape, location and time necessary to effectuate sales of the property, we will accept its estimate. In contrast, offeror neither provided expert testimony nor data on comparable sales in the area.

Salvageable track material—CNW asserts that the value of the entire 22.9 mile line to be purchased (19.2 miles of main line and 3.7 miles of "other track") is $1,539,354. The Shippers Group makes two adjustments to this figure.

First, the Shippers Group asserts that the value for the entire 22.9 miles is only $1,510,291. However, the $29,063 difference between these estimates is not explained. Since the burden of proof is on the offeror, we will accept CNW's statement that the entire line is worth $1,539,354.

Second, the Shippers Group argues that a substantial portion of the 3.7 miles of "other track" is either not owned by CNW or is not required for subsidy operations. It thus substracted (sic) the pro rated value of 2.7 miles from its original $1,510,291 estimate. CNW states, however, that of the 3.7 miles of "other track", 0.42 mile of private siding was not included and the remaining 3.37 miles is necessary because it includes 1.05 miles of industrial sidings at Hayfield and 2.23 miles of side track through Hayfield which are used for providing service to shippers at Hayfield and Waltham, who are among the offerors.

We accpet (sic) CNW's calculations because CNW has already excluded the private sidings from its calculations and has stated that the side track is necessary to service some of the offerors. In conclusion, we find the net salvage value to be $1,539,354.

Rate of Return

The rate of return to be applied to the investment base is the carrier's current cost of capital, after adjustment for the effects of current Federal and State income taxes.

CNW argues that we should apply a rate of return of 12.1 percent. This rate used by the judge in the initial decision,[1] reflects the fair rate of return for the nation's railroads developed in *Adequacy of Railroad Revenue (1980 Determination)*, 364 I.C.C. 311 (1980), *(Revenue Adequacy)*.

Shippers Group urges us to use a rate of return of 9.3 percent. This rate, which represents the nation's railroads' pre-tax cost of capital adjusted for inflation,[2] was used in *Bloomer Line*.

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[1]In *Chesapeake and Ohio Railway Company—Abandonment—South Haven and Hartford* (not printed) decided August 28, 1981, we held that subsidy determinations made in initial decisions are not binding in a subsidy proceeding.

[2]See, *Texas and Pacific Railway Company Abandonment*, 363 I.C.C. 666 (1980).

Our subsidy regulations require that the rate of return be based on the carrier's own cost of capital. Neither party has submitted any data which reflects CNW's cost of capital. Both, however, have inidicated (sic) a willingness to rely on the cost of capital figures used in the *Revenue Adequacy* proceedings. Their only dispute concerns adjustments for inflation and taxes. In the absence of actual evidence, we believe that the railroad industry's cost of capital, properly adjusted, is a reasonable approximation of the return available to CNW. However, the actual subsidy amount must be computed by using the carrier's own cost of capital.[3]

Two adjustments are generally necessary. First, this cost of capital figure must be expressed in pre-tax terms, in accordance with our regulations at 49 C.F.R. 1121.45(a). If we use the statutory tax rate, the pre-tax cost of capital (before inflation) is 19 percent. However, as we noted above, CNW does not pay taxes. Thus the pre-tax cost of capital, adjusted for CNW's actual taxes remains 12.1 percent.

We believe that this pre-tax cost of capital may overstate the rate of return required to compensate the carrier adequately. Without an adjustment it is possible that inflation may be double counted since (1) the pre-tax cost of capital which reflects the impacts of inflation and (2) the value of the rail operating property may appreciate in time solely due to inflation.

In order to prepare a reasonable rate of return, the annual increase to the value of rail property due solely to inflation

[3]An acceptable method for calculating a carrier's individual cost of capital is contained in the *Revenue Adequacy* proceeding. The cost of capital may thus be computed by calculating the carrier's current cost of debt, current cost of equity and weighing these two figures to reflect the carrier's debt/equity capital structure.

should be excluded from the return on investment. The record here does not permit us to ascertain the amount that the value of the rail property increased. Accordingly, we have declined to make any estimates in our illustration.

In the computation of future subsidy amounts, however, the subsidizer may deduct the annual increase in the value of the property which is due *solely* to inflation from the return on investment which it will be required to pay to the carrier. The burden of showing this increase will fall on the subsidizer.

By applying a 12.1 percent rate of return to an investment base of $1,801,789 (working capital of $10,435; income tax benefits of 0, and net liquidation value of $1,791,354, we computed the total return on investment in our illustration at $218,016.

Maintenance of Way and Structures—Maintenance costs are calculated in accordance with the regulations contained in 49 C.F.R. 1121.43(a). Under these regulations, the carrier is allowed to receive reimbursement for the reasonable expenses incurred to maintain the line at Federal Railroad Administration (FRA) Class 1 safety standards. The railroad may charge for additional expenditures only if the shipper requires a higher level of service.

The Shippers Group believes that the $1,969 per maintrack mile expended by CNW in 1980 should be adequate to maintain the line in reasonable operating condition for the immediate future especially since most of the track is FRA Class 3. CNW estimates the maintenance of way expenditure for the subsidy year will be $103,115 or $5,300 per maintrack mile. According to CNW the line deteriorated from Class 3 to Class 1 due to a policy of keeping its operating losses to a minimum by spending a minimum on

maintenance. CNW contends that costs must increase over last year for the line segment to maintain the minimum FRA Class 1 track safety standards.

The subsidizer must pay *all* maintenance of way costs necessary to maintain the line to meet the minimum FRA standards as well as any additional expenses the subsidizer may authorize. In this case, we believe that CNW adequately supported its claim that $103,115 is needed to maintain the line to meet minimum FRA standards for a Class I line. Thus, we will use this figure for illustrative purposes. Of course, offeror will have to pay the actual maintenance costs whether higher or lower than this estimate.

Casualty Reserve Account

CNW has included in its subsidy calculation $15,000 per year for a casualty reserve account. The Shippers Group did not submit an amount for the casualty reserve account. It states, however, that it does not object to paying CNW for the cost of insurance. It does object to a requirement by CNW that an escrow account of $35,000 be established to cover any losses below the deductible amounts of the supplemental insurance.

Under the regulations, the subsidizer is required to pay the carrier for the cost of insurance for the line segment. It is well established that the subsidizer must bear all risks from operation of the line. However, we do not believe that an escrow account is needed. Any accidents on the line will be covered by insurance, and what is deductible will be paid by the subsidizer. We have already found the offeror to be a financially responsible person with the resources to pay for any accidents occuring on the line during the subsidy period.

Administrative Costs

The Shippers Group asserts that 1 percent of the total revenues attributable to the line during the subsidy period is the proper amount to be assigned as administrative costs. CNW maintains that it can claim during any subsidy year either this 1 percent or the actual cost of administering the subsidy if the cost is higher. CNW derived its administrative costs of $2,481 by taking 1 percent of the total revenues.

We agree with CNW. In *Bloomer Line* we ruled that the carrier may either claim the actual costs of administering the subsidy or claim an amount equal to 1 percent of the revenues attributable to the line. 49 C.F.R. 1121.42(k).

Frequency of Service

CNW's estimated subsidy is predicated upon service being performed either twice or three times per week. The Shippers Group did not specify the frequency of service but expressed the view that the frequency of service should be dictated by the subsidizer, not the railroad. The offeror requests that we clarify this point.

We agree that it is the subsidizer who dictates the frequency of service. However, for purposes of illustration, we will base our subsidy illustration upon service being performed twice a week.

Summary of Illustration

A summary of our calculations for the year ended 1980 is contained in Appendix A. If a subsidy agreement had been in place during the base year, the subsidy required of the Shippers Group would have been $363,769.

We emphasize that the figures used in the appendix are for the purpose of illustration only, not an estimate of actual future expenses. Subsidization figures may vary greatly from the number used in our discussion.

CONCLUSIONS

Pursuant to our power to set conditions in subsidy agreements, we will require the offeror to notify both CNW and the Commission of its decision to accept the terms of this decision or withdraw its offer. This written notification must be submitted to CNW and the Commission within 10 days of the service date of this decision.

This decision will not significantly affect either energy consumption or the quality of the human environment.

It is ordered:

1. The Shippers Group must either withdraw its offer or accept the terms of this subsidy agreement within 10 days of service date of this decision. The notification of acceptance or withdrawal shall be made in writing to the Commission, CNW, and all the parties of record.

2. If the Shippers Group files a timely acceptance of the terms of the subsidy agreement it and CNW shall be bound by the terms and conditions established in this decision.

3. If the Shippers Group does not make a timely written acceptance or withdrawal of its offer, the Commission shall treat the offer as if it were withdrawn.

4. If the Shippers Group withdraws its offer, the Commission shall issue a certificate authorizing the abandonment. The abandonment certificate shall be served within 20 days after the service date of this decision.

5. This decision shall be effective on the date it is served.

By the Commission, Chairman Taylor, Vice Chairman Clapp, Commissioners Gresham and Gilliam.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

Finance Docket No. 1 (Sub-No. 113)

Appendix A

1980 Subsidy Requirement
(Reflects two trips weekly)

Total Revenues	$ 248,051
On-branch Costs	
Maintenance of Way and Structures	$ 103,115
Maintenance of Equipment	8,084
Transportation	111,378
Freight Car Costs	18,542
Return on Investment—	
Locomotives	18,196
Property taxes	—
Total	259,315
Off-branch Costs	117,008
Total Avoidable Costs	376,323
Subsidization Costs For	
Rehabilitation	—
Administrative Costs	2,481
Casualty Reserve Account	15,000
Total Subsidization Costs	$ 17,481
Return on Value for Valuation of Property	
a. Working Capital	10,435
b. Income tax benefit	—
c. Property valuation	1,791,354
Total Investment Base	**1,801,789**
Rate of Return	**12.1%**
Total Return on Value	**$ 218,016**
Estimated Subsidy	**$ 363,769**

APPENDIX E

October 30, 1981

Mrs. Agatha L. Mergenovich, Secretary
Interstate Commerce Commission
12th & Constitution Avenue, N.W.
Washington, D. C. 20423

Re: Docket No. AB-1 (Sub-No. 113F), C&NW Abandonment between Oelwein, Iowa and Randolph, Minnesota

Dear Mrs. Mergenovich:

By decision served October 20, 1981, the Commission established conditions and compensation for financial assistance as to a 19.2-mile segment of the line involved in the above proceeding. That action was taken in response to a request to establish such condition filed by Brownsdale Cooperative Association, et al., referred to in the decision as the "Shippers Group."

The Shippers Group hereby withdraws its offer of financial assistance which gave rise to the decision establishing conditions and compensation for financial assistance.

The Shippers Group intends to seek judicial review of the Commission's decision on the merits failing to deny the abandonment application as to the involved 19.2-mile segment of line.

The Shippers Group continues to strongly disagree with the Commission's interpretation of the abandonment and financial assistance statutes, which interpretation has required the Shippers Group to proceed simultaneously in support of inconsistent position—i.e., opposition to the

merits of abandonment and offering financial assistance as if abandonment had been authorized on a final basis.

Very truly yours,

/s/ THOMAS F. McFARLAND, JR.
Attorney for Brownsdale
Cooperative Association, et al.

TMcF:vh:3000
cc: Ms. Ellen D. Hanson
All parties of record

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MAY 12 PAGE 10

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No. 82-1579

IN THE

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October Term, 1982

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and

STATE OF MINNESOTA,
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v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO APPELLEE'S MOTION TO AFFIRM

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COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO APPELLEE'S MOTION TO AFFIRM

INTRODUCTION

The jurisdictional statement sets forth a substantial federal question. The importance of the question presented is amplified by the *amicus* pleadings submitted by the State of Wisconsin and the Iowa Department of Transportation. We nonetheless believe that a brief reply to the appellee's (C&NW) motion to affirm is warranted.

The Hayfield Northern Seeks to Recommence Railroad Service Rather Than to Continue It.

Hayfield Northern wants to recommence rail service on the line in question. To do so, it seeks to condemn the line and obtain anew a certificate of public convenience and necessity from the Interstate Commerce Commission. Respondent has labeled the Hayfield Northern's action an attempt to continue rail service, but service was terminated on the line in 1981 when the ICC issued a certificate of abandonment and there has been no rail service on the line since then. As rail service had been discontinued before Hayfield Northern commenced its action, rail service could not possibly be continued by it, but only recommenced. Casting the Hayfield Northern's desire to reestablish rail service as an attempt to continue rail service misdirects the proper reading of the statutes involved: 49 USC secs. 10905 and 10903.

49 USC 10905 Reaches Rail Property that has Avoided Abandonment Under 49 USC 10903.

Section 10905 is entitled "Offers of financial assistance to avoid abandonment and discontinuance." This section provides two methods for a financially responsible entity to prevent abandonment of a line of rail. One method is that of subsidy (which was the method employed by the Shipper's Group on this line of rail) and the other method is purchase. Section 10905 contemplates uninterrupted continuation of rail service and continuation of federal regulation in the case of subsidy or purchase. Under sec. 10905 there is no abandonment and a federal interest persists. The C&NW conclusion that such federal law shields the line from a state condemnation proceeding *after* a certificate of abandonment issues under sec. 10903 is thus without basis.

On page 15 of its motion to affirm C&NW quotes the following language from the decision of the Court of Appeals:

> The elaborate procedural detail of this statutory scheme indicates that not only has Congress granted the Commission exclusive and plenary authority to regulate abandonments, *Chicago and North Western Transp. Co. v. Kalo Brick & Tile*, 450 U.S. 311, 320 (1981), Congress has granted the Commission exclusive and plenary authority to provide for continuation of rail service in connection with abandonments, *Hayfield Northern R.R. Co., Inc. v. Chicago and North Western Transp. Co.*, 693 F.2d at 822 (J.S.App. A-7).

This statement is correct. The ICC has exclusive authority to provide continued rail service but by the very terms of the statute this continuation takes place *before* abandonment has been consummated. After an abandonment, evidenced by the

issuance of a certificate pursuant to sec. 10903, rail service is terminated and cannot be continued under sec. 10905. Following consummation of an abandonment, there is no remaining federal interest in the line and section 10905 cannot be viewed as preempting state process on that line. To contend otherwise is to contend that the line is forever subject neither to federal authority nor to state power.

There is Long Established Precedent that After Abandonment, Disposition of Rail Property is Subject to State Law.

C&NW ignores a prominent line of cases that hold that rail property after a certificate of abandonment issues is subject to processes of state law. See, e.g., *New Orleans Terminal Company v. Spencer*, 366 F.2d 160 (1966). Instead C&NW refers to cases that prohibit pre-abandonment interference, see e.g., *Chicago and North Western Transp. Co. v. Kalo Brick & Tile*, 450 U.S. 311 (1981).

A State Condemnation Proceeding Does Not Subject the Line of Rail to Protracted Abandonment Proceedings.

C&NW contends that a state condemnation proceeding would frustrate the congressional intent of protecting the railroads "from protracted legal proceedings which are calculated merely to tediously extend the abandonment process." Motion to affirm at 15. This objective has nothing to do with the present situation. The state condemnation proceeding is not designed nor could it possibly affect the abandonment process. Condemnation is necessarily conditioned on abandonment proceedings being complete, i.e., condemnation follows abandonment. Actually, the abandonment proceedings of section 10903 are delayed by the procedures of section 10905, rather than by state condemnation.

CONCLUSION

For the reasons set forth in the jurisdictional statement and in light of the concerns set forth in the *amicus* pleadings of the Iowa Department of Transportation and the State of Wisconsin, plenary consideration is warranted.

Respectfully submitted,

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On Appeal from the United States Court of Appeals
For the Eighth Circuit

MEMORANDUM FOR THE IOWA DEPARTMENT OF TRANSPORTATION AS AMICUS CURIAE

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MEMORANDUM FOR THE IOWA DEPARTMENT OF TRANSPORTATION AS AMICUS CURIAE

PRELIMINARY STATEMENT

This Memorandum is filed by the Iowa Department of Transportation (Iowa DOT) in support of the position asserted by Hayfield Northern Railroad Company, Inc. and the State of Minnesota. Iowa DOT has reviewed Hayfield Northern's and the State of Minnesota's Jurisdictional Statement and wholly adopts the contents contained therein. Iowa DOT concurs with the position that the power to exercise eminent domain is available on an abandoned line of rail. Preemption of a state

statute should not be made absent compelling circumstances. The attributes of sovereignty enjoyed by the various states includes the power of eminent domain. The State of Iowa has enacted statutory provisions which are substantially similar to the relevant Minnesota statutes. Iowa DOT concurs in the position taken by Hayfield Northern and the State of Minnesota in asserting that 49 U.S.C. §10905 (Supp. IV 1980) does not preempt the Minnesota condemnation statute when a Minnesota railroad company attempts to condem the track and right of way of a properly abandoned rail line in order to continue rail service on that line.

RELEVANT IOWA STATUTORY PROVISONS

The Code of Iowa provides that the State of Iowa or a railway corporation may acquire property by condemnation under certain circumstances. IOWA CODE §471.6 (1983) states:

> The state or any railway corporation, may acquire by condemnation property as may be necessary for the location, construction, and convenient use of a railway. The acquisition shall carry the right to use for the construction and repair of the railway and its appurtenances any earth, gravel, stone, timber, or other material, on or from the land taken.

Additionally, IOWA CODE §471.9 (1983) states:

> The state or a railway corporation may, by condemnation or otherwise, acquire lands for the following additional purposes:
>
> 1. For necessary additional depot grounds or yards.
>
> 2. For constructing a track or tracks to any mine, quarry, gravel pit, manufacturing plant, warehouse, or mercantile establisment.

3. For additional or new right of way for constructing double track, reducing or straightening curves, changing grades, shortening or relocating portions of the line, and for excavations, embankments, or places for depositing waste earth.

4. For the preservation of abandoned railroad right of way for future railroad use.

These grants of statutory authority to the State or any railroad corporation could be subverted should the decision from which this pending appeal is taken is allowed to stand. The decision is extremely over-broad in that there are no time constraints regarding the preemptive aspects of the Interstate Commerce Act. For example, this decision could effectively prohibit a state or railroad corporation from acquiring previously abandoned property by condemnation even though the abandonment took place many years previous. Iowa DOT believes that the proper determination of this issue should be that no State condemnation action could lie during the pendancy of the Interstate Commerce Commission abandonment proceeding; however, once the Interstate Commerce Commission concluded the abandonment, its jurisdiction over that property would end and the sovereignty of the States would take over, thereby allowing condemnation in accordance with the particular State statutes.

The Interstate Commerce Commission has consistently held that continuation of rail service is in the best interest of a national transportation policy. In a Notice of Proposed Rules and Proposed Exemptions, served March 21, 1980, Finance Docket No. 28990F, Common Carrier Status of States, State Agencies and Instrumentalities and Political Subdivisions, 363 I.C.C. 132 (1980), the Commission stated that exemption of States from common carrier status "would be based on findings that continued application of some of our regulations to States that acquire abandoned rail lines and to those who operate them would

not be necessary to carry out the national transportation policy, would be burdensome on the States and the operators, and would service no public purpose. In fact, application of some of our regulations may operate to thwart the *public purpose of continuing rail service to shippers on abandoned lines* through the subsidy program." (Emphasis supplied.) The Commission further stated within the same Notice: "If a line has been lawfully abandoned, acquisition lies outside our jurisdiction as the line is not considered rail property." In the same proceeding, the Commission rendered a decision on July 23, 1980, adopting final rules and exemptions. The Commission stated:

> The purpose of these proposals is to promote continuation of rail service by removing certain regulatory constraints from the States and thus encouraging rail continuation programs. In addition, it will remove regulatory constraints which might discourage new operators from initiating service over marginal lines. Within the last year two major rail systems, the Chicago, Rock Island and Pacific Railroad Company, and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company have terminated either all or a substantial portion of their operations. In response to the threat of losing rail service that the States find vital to their economic well being, several States have developed programs to continue service. These programs include plans by States to purchase rail lines and contract with operators to provide service. Also, new businesses have been organized to provide service over these lines. This proposal is designed to facilitate these efforts.

The Commission went on to state:

> The purpose of this proceeding is to facilitate the acquisition and operation of lines for which service by the current carrier will in all likelihood not be continued. *This purpose clearly fulfills our most fundamental congressional mandate: to ensure the development, coordination, and preservation of a transportation system.* (Emphasis supplied.)

The final rules adopted by the Interstate Commerce Commission were appealed to the United States Court of Appeals for the District of Columbia Circuit. See *Patrick W. Simmons* v. *Interstate Commerce Commission,* 697 F.2d 326 (D.C. Cir., 1982) In that decision the Court stated: "The Commission found that the exemption would assist the states in continuing rail service for this limited class of abandoned lines and would remove obstacles that might prevent state acquisition of abandoned rail lines." Furthermore, the Court held that: "It is abundantly evident that Congress desired to facilitate the development of state rail programs, a policy established initially in the 4-R Act and continued in the Staggers Act." Congress recognized the importance of continued rail service when it adopted a rail transportation policy. 49 U.S.C. §10101a states:

> In regulating the railroad industry, it is the policy of the United States Government -
>
> . . .
>
> (4) To ensure the *development and continuation of a sound rail system* with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense. (Emphasis supplied.)

Congress and the Interstate Commerce Commission has consistently been aware of the importance of continued rail service in the United States. Likewise, the State of Iowa enacted legislation in 1980 in order to preserve continued rail transportation in Iowa. The Iowa Department of Transportation, in conjunction with the Iowa Railway Finance Authority, is a potential acquirer of railway facilities which have been abandoned or approved for abandonment. IOWA CODE §307B.5 creates the Iowa Railway Finance Authority and IOWA CODE §307B.2 contains a declaration of necessity and purpose:

The purpose of this chapter is to benefit the citizens of Iowa by improving their general health, welfare and prosperity and insuring the economic and commercial development of the state and by promoting agricultural and industrial improvement. *Access to adequate railway transportation facilities is essential to the economic welfare of the state. One purpose of this chapter is to preserve or provide for the citizens of Iowa those railway services now in existence or needed in the state which have a viable future but which for a variety of economic and legal reasons may not exist if the state does not provide the financing or other mechanisms referred to in this chapter.* It is the intent of the chapter that any public ownership and control of railway facilities provided for in this chapter be transferred to private ownership as promptly as economically practicable subject to financing requirements. It is further intended that the authority created in this chapter be vested with all powers to enable it to accomplish the purposes of this chapter except the power to operate rolling stock.

It is the further intent of this chapter and of the general assembly that, in order to preserve rail competition and to provide for railway service in this state, the authority work primarily with railroad carriers already providing service in this state based upon their willingness and ability to meet these objectives. (Emphasis supplied.)

Legislative findings are contained within IOWA CODE §307B.3. The relevant findings are as follows:

307B.3 Legislative findings. The general assembly finds and declares as follows:

1. **The establishment of the authority is in all respects for the benefit of the people of the state of Iowa, for the improvement of their health and welfare, for the**

preservation and creation of employment, and for the promotion of the economy and of agricultural and industrial improvement, which are public purposes.

. . .

3. There will exist a serious shortage of viable rail lines and railway facilities serving the urban, rural, agricultural and industrial communities of the state.

4. There exists a serious problem in this state regarding the ability of agricultural producers to transport economically farm products to traditional markets because of the abandonment and possible abandonment of railway facilities within the state.

. . .

10. It is necessary to create a railway finance authority to encourage the investment of private capital and stimulate the construction, rehabilitation and repair of railway facilities and to prevent the abandonment of others through the use of public financing, publicly assisted financing and other forms of public assistance.

. . .

The powers of the Iowa Railway Finance Authority are contained within IOWA CODE §307B.7 and in relevant part state as follows:

307B.7 Powers of the authority. The authority shall have all powers necessary for the performance of its purposes and duties, included but not limited to, the power to:

. . .

4. **Exercise the power of emminent domain.**

5. Acquire railway facilities, whether located within Iowa or a contiguous state, directly or through an agent, by purchase, lease, lease-purchase, gift, devise or otherwise.

. . .

18. Own a railway facility under this chapter alone, in partnership, or in any other association with any person if necessary or beneficial to preserve part of a railway system, upon the determination, after consultation with the department, that the railway facility is necessary or beneficial to the railway system, to be relinquished to nonauthority ownership or operation as soon as economically practicable.

. . .

CONCLUSION

The State of Iowa has a vital interest in preserving railway service in the state. Specific legislation was enacted creating the Iowa Railway Finance Authority in order to ensure that essential railway lines be preserved. The powers and duties of the Iowa Railway Finance Authority are in addition to the abovementioned authority of the State and any railway corporation in acquiring by condemnation abandoned railroad right of way for future railroad use. Iowa DOT believes that once the Interstate Commerce Commission has rendered a final determination regarding an abandonment, its jurisdiction terminates and no preemption of state laws should occur after termination of Interstate Commerce Commission jurisdiction. The Iowa Department of Transportation, in support of the position of Hayfield Northern Railroad Company, Inc., and the State of Minnesota respectfully requests that this Court review, and reverse the decision rendered by the Eighth Circuit Court of Appeals.

Respectfully submitted,

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RESPONSE OF APPELLEE TO MEMORANDUM FOR THE IOWA DEPARTMENT OF TRANSPORTATION AS AMICUS CURIAE AND PROPOSED BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT ON BEHALF OF THE STATE OF WISCONSIN

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STATEMENT

This memorandum is submitted to supplement the matter contained in Appellee's Motion to Affirm, and will spe-

cifically respond to matters raised in the Memorandum for the Iowa Department of Transportation as Amicus Curiae (hereinafter "Iowa DOT Memorandum") and the Proposed Brief in Support of Jurisdictional Statement on Behalf of the State of Wisconsin (hereinafter "Wisconsin Brief") in this action.[1]

ARGUMENT

The decisions of the District Court and the Court of Appeals correctly concluded that, on the facts presented, 49 U.S.C. §10905 (Supp. IV 1980) preempts Minnesota condemnation law when a Minnesota railroad company attempts to condemn the track and right of way of a properly abandoned rail line in order to continue rail service on that line (J.S.App.C, A-15; J.S.App.A, A-1 to A-2). The Iowa DOT Memorandum and the Wisconsin Brief, however, inappropriately extend the holdings and effects of the decisions of the courts below in an effort to enhance the substantiality of the narrow questions presented by this appeal.[2] This Court should not be distracted by the efforts of Iowa DOT and Wisconsin to inject extraneous issues and considerations into the Court's determination of the narrow issues presented by this appeal.

Iowa DOT and Wisconsin improperly attempt to portray the Court of Appeals' construction of 49 U.S.C. §10905 as a direct affront to a State's ability or effort to preserve local

---

[1] The Iowa DOT Memorandum and the Wisconsin Brief were received by Appellee subsequent to the service and filing of Appellee's Motion to Affirm and Appendix to Motion to Affirm in this action.

[2] Iowa DOT and Wisconsin similarly attempted to magnify the significance attached to the contentions raised in connection with Appellant's and Appellant/Intervenor's unsuccessful petitions and suggestions for rehearing and rehearing en banc by their filing of amicus curiae statements with the Court of Appeals.

rail service (Iowa DOT Memorandum 3; Wisconsin Brief 4). Such a portrayal endeavors to present issues and considerations which are separate and distinct from the precise issues and considerations addressed by the District Court and the Court of Appeals, to wit, in the context of the Shippers Group's (i.e. Appellant's) participation in and virtual exhaustion of the procedures set forth in 49 U.S.C. §10905:

> (1) Whether 49 U.S.C. §10905 preempts Minnesota condemnation law when a Minnesota railroad company attempts to condemn the track and right of way of a properly abandoned rail line in order to continue rail service on that line; and
>
> (2) Whether Appellant's attempt to condemn the subject track and right of way constitutes an impermissible collateral attack on the Interstate Commerce Commission's determination of value of the track and right of way.[3]

The interfacing of 49 U.S.C. §10905 and a State's rail preservation program, such as the programs of the States of Iowa and Wisconsin, has not been the subject of the decisions of the courts below in this action.

The Iowa and Wisconsin statutory and constitutional authorities permitting State activity in rail preservation programs differ substantially from the purported power of Appellant to acquire Appellee's track and right of way for continued rail purposes.[4] The idiosyncracies of the Iowa and Wisconsin statutory and constitutional provisions per-

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[3] *See* Appellee's Motion to Affirm at i.

[4] *See, e.g.*, Wis. Stat. Ann. §85.09 (2) and (3) (West 1982) (J.S.App.T. A-66 to A-67), which provide that under Wisconsin's rail preservation program, only *abandoned* rail property may be acquired.

mitting State activity in rail preservation programs have no bearing on, and only serve to distort, the Court's review of the purported authority of Appellant to proceed under state condemnation authority which is accorded Minnesota railroad corporations to acquire property for railroad purposes.[1] The Iowa and Wisconsin statutory and constitutional authorities relating to such States' rail preservation programs are, therefore, properly excluded from this Court's consideration of the questions presented by this appeal.

CONCLUSION

The Iowa DOT Memorandum and the Wisconsin Brief inject extraneous issues and considerations which are not properly before this Court in its review of the decision of the Court of Appeals. Such issues and considerations serve only to distort the clarity of the narrow questions which were decided by the courts below, and are properly excluded from this Court's consideration in its review of the ques-

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[1] *See* Minn. Stat. §222.27 (1982) and Minn. Stat. §300.04 (1982) (J.S. 2 and 3, respectively).

tions presented by this case. On the facts presented, the Court of Appeals' decision is so eminently correct as to warrant summary affirmance by this Court.

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No. 82-1579

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HAYFIELD NORTHERN RAILROAD COMPANY, INC.,
Appellant,

and

STATE OF MINNESOTA,

Appellant/Intervenor,

v.

CHICAGO, NORTH WESTERN TRANSPORTATION COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

~~MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE* AND TO FILE A~~ BRIEF IN SUPPORT OF THE JURISDICTIONAL STATEMENT ON BEHALF OF THE STATE OF WISCONSIN AND PROPOSED BRIEF

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The State of Wisconsin, by its Attorney General, moves this Court for leave to appear as an *amicus curiae* and to

file the attached brief in support of the jurisdictional statement and to appear in an *amicus* capacity throughout the proceedings in the Court.

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INTEREST OF THE *AMICUS CURIAE*

The State of Wisconsin has two distinct but overlapping interests.

First, as a sovereign state it has an interest in preserving the right of eminent domain as an essential attribute of its sovereignty.

Second, as a state committed to the restoration of rail service on lines abandoned under the authority of the federal government, the Court of Appeals' decision presents a serious setback. Wisconsin can acquire only abandoned rail property, by reason of state law. The Court of Appeals forecloses all states from acquiring abandoned property by eminent domain. Thus, an essential tool for providing necessary services is frustrated.

ARGUMENT

The Question Is Substantial

A. A sensitive federalism issue is presented

On its face, ousting states of their eminent domain sovereignty is a matter of the highest importance in federal-state relations.

The Solicitor General describes this case as "involv[ing] delicate questions of federalism." (A. 30.) The ICC General Counsel describes it as involving a "significant Tenth Amendment issue because [the holding below] interferes with the State's choice of purposes for which it authorizes use of an integral governmental function — the power of eminent domain." (A. 59.)

B. Essential attributes of state sovereignty are at stake

Running a railroad is not an essential attribute of state sovereignty. *United Transportation Union v. Long Island Railroad Company*, 458 U.S. 678 (1982). Implementing a public purpose through eminent domain is. Nichols, *The Law of Eminent Domain*, sec. 1.141[3] (3d ed. 1981).

The Court of Appeals evidently would permit condemnation of abandoned rail property for recreational or scenic purposes, or to build a highway. Its foreclosure of eminent domain to preserve intrastate rail service is an unprincipled distinction that invades the prerogatives of a sovereign state to choose. As will be seen, it frustrates federal interests as well.

The holding creates a void in the Republic. The federal government has permitted abandonment of rail service in a small part of Minnesota at the behest of a private entrepreneur who cannot make a financial go of it. The Eighth Circuit now concludes that states are impotent to meet the local rail need *in futuro* because of federal abandonment. Wisconsin's local rail preservation program would be devastated under this ruling, because Wisconsin can acquire only abandoned rail property. Sec. 85.09(2), Wis. Stats. (A. 66.)

C. The federal and state programs are in harmony

The Court of Appeals made three errors in analysis: (1) it neglected to attempt to harmonize state and federal law; (2) it failed to appreciate that Congress encourages local programs like Minnesota's to revive rail service in the wake of the hemorrhaging abandonments throughout the interstate rail corridors; and (3) it saw state-federal conflicts where none exist because it did not discern the complementary nature of the two programs.

One can agree with the court, at least *arguendo*, that a state rail preservation program must not stand as an obstacle to the federal program. But one still can insist on the court's duty to attempt to find harmony between the two programs. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973).

The laws are in harmony. Congress has fostered state restoration of local service to replace federally abandoned rail lines. The "collapse of several major carriers necessitated a substantial federal effort to ensure continuation of vital service." *Simmons v. I.C.C.*, 697 F.2d 326, 328 (D.C. Cir. 1982). This effort included "encouraging states to become involved in the preservation of local rail service." *Id.* Through subsidies and other means, the "congressional policy . . . plac[es] the states at the forefront of the federal effort to preserve local rail service." *Id.* at 329. Because of state involvement after abandonment, the ICC acknowl-

edged "it lacked jurisdiction to regulate state acquisition of an abandoned rail line, since by the process of abandonment the line lost its status as rail property." *Id.* at 331.

Although federal jurisdiction is lacking as to state acquisition of an abandoned line, Commission jurisdiction awakens once operation of the line resumes. *Id.* But states were exempted from many of the ICC start-up rules in order to "remove obstacles that might prevent state acquisition of abandoned rail lines." *Id.* at 332.

Thus, federal policy is served only by encouraging state acquisitions of abandoned rail property. The court's failure to understand this is its basic flaw.

Title 49 U.S.C. sec. 10905 concerns the process of abandonment, not subsequent acquisition. It only "postpone[s]" the abandonment date on receipt of an offer of financial assistance. It is a tool to avoid abandonment, not a solution after abandonment. Whatever state powers may be preempted prior to abandonment, the ICC General Counsel agrees that "once a rail line has been abandoned, section 10905 can no longer be viewed as preempting a state law condemnation." (A. 45.) For the subsequent state action "would not alter the carrier's status as a common carrier." (A. 49.) Indeed, the ICC has not participated in this case because the outcome will not affect the Commission's "exercise of its power to regulate the abandonment of service, including the provisions of section 10905." (A. 59.) The federal interest ceases upon abandonment "because the line has been found not to be required in interstate commerce." *Id.*

The Eighth Circuit did not appreciate the cooperative federalism erected by Congress: the ICC controls the abandonment process; the states are encouraged to then take over to revive local rail service.

Lacking this perception of the overall federal scheme, the Court of Appeals saw conflicts where none exist.

The court saw a conflict from delay caused by eminent domain proceedings. But post-abandonment condemnation does not delay the abandonment. Congress shortened the ICC abandonment process from six months to about 110 days for two reasons. One purpose was to protect carriers from efforts to "tediously extend the abandonment process." H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 125 (1980). The ICC General Counsel notes this quote refers to the previous six months at the ICC, not a subsequent state condemnation. (A. 61.) State condemnation, of course, does not extend abandonment proceedings; it operates only after completion of abandonment.

Congress' second purpose in abbreviating the six months was to protect states from carrier gouging. The six-month period "enabled a railroad to hold out for a price that would reflect at least some of the value of continued rail service." *Chicago and North Western Transp. Co. v. U.S.*, 678 F.2d 665, 667 (7th Cir. 1982). Congress did not want this power in railroads, and "[t]hat is why it amended section 10905 in 1980 to allow — indeed require — the Commission to fix the price of the sale if the parties could not agree." *Id.* at 668. The purpose of protecting states is not frustrated by allowing condemnation.

The court also saw a conflict in using condemnation as a price setting mechanism after invocation of the price setting mechanism in sec. 10905. First, however, this "conflict" at best would foreclose the 10905 offeror from using state condemnation, perhaps on a waiver theory. It hardly warrants the court's sweeping conclusion that the mere existence of sec. 10905 jettisons any post-abandonment condemnation, regardless of whether 10905 is invoked or whether the condemnor and 10905 offeror are one and the same. Second, sec. 10905 expressly empowers the offeror to walk away from the ICC price; only the carrier is bound. 49 U.S.C. sec. 10905(f) (2). Since Congress expressly refrained from binding the offeror, the court should not do so even on a waiver theory, much less under the guise of

a preemption analysis. Third, the purpose in binding the carrier was not to save it from condemnation or to terminate acquisition efforts, but was to exact a *quid pro quo* for the accelerated process. As accelerated, the carrier can reduce the losses on an unprofitable line, but it is bound by the price. *See Chicago*, 678 F.2d at 671. While the offeror can yet choose condemnation, it must suffer the lost service in the interim. Fourth, different valuation factors arise in a condemnation that may make the price lower or higher. *See* Opinion of ICC General Counsel. (A. 46, esp. n. 3.)

Finally, the court saw a conflict from state law because of the detailed procedure in 10905. However, as the ICC Office of Proceedings noted, 10905 sets forth "an extensive statutory plan for such sales *before* abandonment becomes effective, but there is nothing in the statute to suggest a federal interest in the property once abandonment is consummated." (A. 55.) (Emphasis in original.)

D. The decision frustrates federal interests

By foreclosing state eminent domain acquisitions of abandoned rail property, the Eighth Circuit frustrates the congressional policy to place the states at the forefront of restoring service in this depression-plagued industry.

The ICC General Counsel has noted the federal funding programs designed to instigate state activity. (Juris. Statement at 15.) *Also see Simmons*, 697 F.2d at 328-29. The Eighth Circuit stymies use of the funds. Apart from use of federal funds, the decision has "foreclosed one important means by which states may help to continue rail service," ICC General Counsel. (A. 59.)

E. The decision has absurd consequences

Since abandoned railroads often lie fallow for months or years, *see* A. 57, the Eighth Circuit decision means the states could not condemn even after that dormancy. Moreover, since preemption is a jurisdictional matter, a state could not condemn even if the carrier agreed such procedure

was the best price-setting mechanism. Indeed, even with a dozen intervening private owners, 10905 so runs with the land, under the ruling even into the twenty-first century, that the state could not condemn for rail purposes — ever.

Further, if abandonment under 10905 preempts state law afterwards, how can the railroad sell the property if not pursuant to state law? If the federal interest continues, how can it be sold even if state recording laws, etc., otherwise apply? What federal interest survives? Is it assumed only eminent domain is preempted? If so, is it because a state judicial system cannot be trusted to ascertain just compensation? It is the ICC, however, and not state courts, that lacks valuation experience.

F. Only parochial interests are served by the decision

This decision serves no federal regulatory interest, as witnessed by the ICC's declination to worry about it. It jeopardizes state prerogatives, as witnessed by the active involvement of the neighboring states. It serves no interest of the Association of American Railroads. (Juris. Statement at 11.)

This decision serves only the parochial interests of a single carrier that apparently wishes to remove the track, thereby obstructing the state and federal interest to restore service.

SUMMARY OF ARGUMENT

This case presents a substantial federal question.

The decision below declares that Congress has preempted the state power of eminent domain. Eminent domain, however, is an essential attribute of state sovereignty which can be preempted, if at all, only under the clearest of conflict with federal law.

No such conflict appears here. In fact, the programs are in harmony. The federal interest lies in controlling the con-

ditions under which a rail carrier may abandon service. Once that service is abandoned, no federal regulatory interest in the rail line survives. It is federal policy, however, to encourage states to fill the void by developing programs to restore local rail service.

The decision below denies the use of eminent domain to pursue the federal policy of restoring local rail service through state programs. In so doing, the court has both frustrated federal policy and invaded an essential attribute of state sovereignty.

CONCLUSION

It is respectfully submitted that this court should note its jurisdiction and set the case for plenary consideration.

Respectfully Submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1983

HAYFIELD NORTHERN RAILROAD COMPANY, INC., AND MINNESOTA, APPELLANTS

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Interstate Commerce Act, 49 U.S.C. (Supp. V) 10905, preempts state law authorizing the condemnation of an abandoned railroad line for the purpose of providing rail service.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

This is an appeal from a decision of the United States Court of Appeals for the Eighth Circuit holding that the Interstate Commerce Act (49 U.S.C. (Supp. V) 10905) preempts a Minnesota law that authorizes the condemnation for railroad use of a rail line that had been abandoned with the approval of the Interstate Commerce Commission (ICC).

1. The Interstate Commerce Act provides that a rail carrier subject to ICC jurisdiction may abandon its lines or discontinue its operations "only if the Commission finds

that the present or future public convenience and necessity require or permit the abandonment or discontinuance." 49 U.S.C. (Supp. V) 10903. The Act requires that the carrier file with the ICC an "application for a certificate of abandonment or discontinuance * * * and a notice of intent to abandon or discontinue * * *." 49 U.S.C. (Supp. V) 10904.

The Act also provides that the ICC shall publish in the Federal Register its findings "that the public convenience and necessity require or permit abandonment or discontinuance of a particular railroad line" and that "[w]ithin 10 days following the publication, any person may offer to pay the carrier a subsidy or offer to purchase the line." 49 U.S.C. (Supp. V) 10905(c). If the ICC finds within 15 days that the offeror is "a financially responsible person (including a government authority)" and that the offer of assistance meets prescribed standards, it "shall postpone the issuance of a certificate authorizing abandonment or discontinuance * * *." 49 U.S.C. (Supp. V) 10905(d).

In the event the offeror and the carrier "fail to agree on the amount or terms of the subsidy or purchase, either party may, within 30 days after the offer is made, request that the Commission establish the conditions and amount of compensation." 49 U.S.C. (Supp. V) 10905(e). Upon such request, the ICC is "to establish the conditions and amount of compensation * * * within 60 days," and this "decision * * * shall be binding on both parties, except that the person who has offered to subsidize or purchase the line may withdraw his offer within 10 days of the Commission's decision." 49 U.S.C. (Supp. V) 10905(f)(1)(A) and (2). If the offer is withdrawn, "the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance * * *" (*ibid.*).

Under these provisions, the maximum time that may elapse from the publication of proposed abandonment to the conclusion of the process for subsidy or purchase is 110 days.

2. The relevant facts in this case are undisputed and are set forth in the opinion of the court of appeals (J.S. App. A2-A3). In July 1981, the Commission issued an initial decision pursuant to 49 U.S.C. (Supp. V) 10903 that the public convenience and necessity require or permit the abandonment of a 44-mile branch line of appellee Chicago and North Western Transportation Company (CNW). Pursuant to Section 10905, a group of shippers on the line submitted an offer of financial assistance to subsidize the operation of a 19.2-mile segment of the line in Minnesota (the Hayfield segment). The group also filed an administrative appeal from the initial decision insofar as it permitted abandonment of the Hayfield segment.

The Commission found that the shippers' group was a "financially responsible person" within the meaning of Section 10905(d) and, as required by that subsection, delayed the issuance of the certificate of abandonment that would have allowed CNW to cease operating the line. Because of the inability of the shippers' group and CNW to agree on a subsidy, the shippers' group asked the Commission, pursuant to subsection (e), to establish the conditions and level of subsidy. The Commission determined the subsidy level and, as a necessary part of that calculation, also determined the net liquidation value of the Hayfield segment to be $1,791,354. The shippers' group thereafter withdrew its subsidy offer as permitted under subsection (f)(2). J.S. App. A2.

In October 1981, the Commission affirmed its initial decision allowing the abandonment of the entire line,

including the Hayfield segment.[1] The Commission issued an abandonment certificate in November 1981. All of the foregoing actions occurred in timely compliance with the requirements of Section 10905. J.S. App. A2.

3. On December 17, 1981, CNW ceased operating the line. Thereafter, CNW made arrangements to salvage and utilize the track from this line in a project in Iowa. J.S. App. A3.

On March 31, 1982, members of the shippers' group formed appellant Hayfield Northern Railroad Company, Inc. (Hayfield Northern), a Minnesota public service corporation that has power under Minnesota law (Minn. Stat. § 300.04 (1982)) to condemn rail lines for railroad purposes. Hayfield Northern immediately filed suit in state court, alleging that it desired to condemn the right of way, track, and appurtenances of the Hayfield segment. It also sought a temporary restraining order to prevent CNW from dismantling the line. The state court granted the restraining order. J.S. App. A3.

CNW removed the suit to the United States District Court for the District of Minnesota and moved to dismiss on the ground that Section 10905 preempts state law authorizing condemnation of an abandoned rail line for railroad purposes. The State of Minnesota intervened on the side of Hayfield Northern in order to defend the applicability and validity of its statute. J.S. App. A3.

The district court granted summary judgment in favor of CNW because "federal law has preempted the state law as it

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[1]The shippers' group petitioned for judicial review in *Brownsdale Cooperative Ass'n* v. *United States*, No. 81-2333 (8th Cir. Dec. 3, 1981), and sought a stay pending review of the Commission's final decision. After the court denied the request for a stay, the shippers moved to dismiss their petition. The court granted this voluntary dismissal on January 14, 1982.

applies to procedures seeking continued rail service in connection with an abandonment" (J.S. App. A15). Accordingly, the court dismissed the complaint with prejudice and dissolved the restraining order (*id.* at A16).

4. The United States Court of Appeals for the Eighth Circuit granted a stay to Hayfield Northern upon the posting of a bond. After argument on the merits, the court of appeals dissolved the stay, affirmed the judgment of the district court, and remanded to that court "for a determination of the amount of damages due CNW on account of delay" (J.S. App. A12).

The court of appeals held that Section 10905 preempts the Minnesota statute because "the state law authorizing Hayfield Northern to condemn CNW's abandoned railroad line for continuing rail purposes 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' " (J.S. App. 5, quoting *Fidelity Federal Savings & Loan Association* v. *de la Cuesta,* No. 81-750 (June 28, 1982), slip op. 10).[2] First, the court concluded that Section 10905 "makes provision for continued rail service an integral part of the federal abandonment process" (J.S. App. A6) and that "[t]he elaborate procedural detail of this scheme indicates that * * * the Commission [has] exclusive and plenary authority to provide for continuation of rail service in connection with abandonments" (*id.* at A7). In addition, the court found that state condemnation actions might involve " 'protracted legal proceedings' " that would frustrate "the benefits of the 110 day time schedule" under Section 10905 (J.S. App. A7). The court also found that state condemnation actions "would circumvent the Commission's determination of value" and would

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[2]The court of appeals confined its holding to state condemnation "for continued rail service" and did not decide "whether condemnation for non-rail public purposes would also be pre-empted by federal law" (J.S. App. A9).

deviate from the "expedited method by which sale price may be determined [under Section 10905]" (J.S. App. A8). Finally, the court rejected appellants' argument that the Commission and the federal courts had recognized that the Interstate Commerce Act does not preempt state authority to condemn abandoned rail lines (*id.* at A8-A11).

Following the denial of rehearing by the court of appeals (J.S. App. A16-A17), this Court denied appellants' motion to stay the issuance of the court of appeals' mandate (*id.* at A26-A29).

ARGUMENT

The resolution of the question presented in this case does not directly implicate the interests of the federal government. As discussed below, the abandonment authority of the Interstate Commerce Commission does not extend beyond the point at which the certificate of abandonment becomes effective.[3] Furthermore, we believe that no other statutory or programmatic interest of the United States would be materially affected by the exercise of the state's condemnation powers in this case. We therefore agree with appellants that the court of appeals erred in holding that the Interstate Commerce Act preempts state condemnation of an abandoned railroad line for the purpose of providing rail service.[4]

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[3]Of course, a new operator must obtain a certificate from the Commission before recommencing rail service. See 49 U.S.C. (Supp. V) 10901; 49 C.F.R. 1150.1 *et seq.; Common Carrier Status of States*, 363 I.C.C. 132, 138 (1980), aff'd *sub nom. Simmons* v. *ICC*, 697 F.2d 326 (D.C. Cir. 1982).

[4]Because no direct federal programmatic interest is involved in this case, the ICC elected not to participate in the lower courts even though it believed that appellants "have the best of the argument, and that once a rail line has been abandoned, Section 10905 can no longer be viewed as preempting a state law condemnation" (J.S. App. A45; footnote omitted).

1. Appellants have not challenged that Congress, in the exercise of its power under the Commerce Clause, could preempt the condemnation of abandoned railroad lines. Cf. *Block* v. *North Dakota*, No. 81-2337 (May 2, 1983), slip op. 17 n.26; *Oklahoma* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941).[5] Therefore, the only question in this case is whether the Interstate Commerce Act does so.

As the Court has recently noted, "[t]he goal of any preemption inquiry is 'to determine the congressional plan.' " *Rice* v. *Rehner*, No. 82-401 (July 1, 1983), slip op. 4-5, quoting *Pennsylvania* v. *Nelson*, 350 U.S. 497, 504 (1956). In making that inquiry, " 'we start with the assumption that the historic police powers of the States were not to be superseded by Federal Act unless that was the clear and manifest purpose of Congress.' " *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977), quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). "This assumption provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts" (430 U.S. at 525; citation omitted).

Accordingly, it is well settled that " 'an unexpressed purpose to nullify * * * [state power] is not lightly to be attributed to Congress.' " *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 103-104 (1980), quoting *Parker* v. *Brown*, 317 U.S. 341, 351 (1943). "Preemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other

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[5]As a matter of constitutional principle, such a statute would be no different from the established federal preemption of state condemnation of rail lines prior to abandonment. See, *e.g.*, *In re New York, N.H. & H. R.R.*, 447 F.2d 428, 429-430 (2d Cir. 1971); *Massachusetts* v. *Bartlett*, 266 F. Supp. 390, 392-393 (D. Mass.), aff'd in relevant part, 384 F.2d 819, 819-820 (1st Cir. 1967), cert. denied, 390 U.S. 1003 (1968).

conclusion, or that Congress has unmistakably so ordained.' " *Chicago & N.W. Transp.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981), quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963). And, where possible — as it is here — "the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' " *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117, 127 (1973), quoting *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963).[6]

2. In light of these principles, it cannot be concluded that the Commission's abandonment authority under the Interstate Commerce Act preempts state condemnation of abandoned rail lines. Nothing in the Act suggests that the acquisition of an already-abandoned rail line and the resumption of service are "an integral part of the federal abandonment process" (J.S. App. A6) or that the Commission has "exclusive and plenary authority" over such matters "in connection with abandonments" (*id.* at A7). The Commission itself has recognized that it does not have the power to regulate the transfer of a rail line after a certificate of abandonment has taken effect. For example, in *Abandonment of Railroad Lines and Discontinuance of Service*, 365 I.C.C. 249, 261 (1981), the Commission observed that "the disposition of rail property after an effective certificate of abandonment has been exercised is a matter beyond the scope of the Commission's jurisdiction, and within a State's reserved jurisdiction. Questions of title to, and disposition

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[6]These principles are especially apt in a case involving a state's condemnation authority, which is "part of its sovereign power" (*United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 277 (1943)) and "an attribute of sovereignty * * * [that] inheres in every independent State * * * [and is] necessary for the proper performance of governmental functions" (*Georgia* v. *City of Chattanooga*, 264 U.S. 472, 480 (1924)).

of, the property are matters subject to State law." See also *Chicago & N.W. Transp. -- Abandonment -- in Waukesha, Jefferson and Dane Counties, Wisc.*, I.C.C. Docket No. AB-1 (Sub-No. 144) (May 5, 1983) ("after all conditions to an abandonment have been complied with and the certificate is *effective*, federal interest and Commission jurisdiction end");[7] *Common Carrier Status of States*, 363 I.C.C. 132, 135 (1980), aff'd *sub. nom. Simmons* v. *ICC*, 697 F.2d 326 (D.C. Cir. 1982) ("when a rail line has been fully abandoned, it is no longer a rail line and the transfer of the line is not subject to our jurisdiction").[8] The court of appeals' attempted distinction of these Commission decisions (J.S. App. A8-A11) is unpersuasive and does not rebut the Commission's determination that it lacks authority — let alone exclusive and preemptive authority — over transfers of abandoned rail lines.

The Commission does have "exclusive" and "plenary" authority over abandonments, *Chicago & N.W. Transp.* v. *Kalo Brick & Tile Co., supra*, 450 U.S. at 320, 321; and this authority extends to pre-abandonment offers of financial assistance under Section 10905. But this authority ends when the abandonment has taken effect. At that point, the issue is not — as the court of appeals believed — the "continuation of rail service" (J.S. App. A7) but rather the commencement of new service requiring a fresh certificate of public convenience and necessity from the Commission (see note 3, *supra*). The Commission's authority over abandonments, including its authority to facilitate continuing

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[7]This decision is reprinted in the appendix to appellants' joint supplemental memorandum (at A5).

[8]Furthermore, one court has assumed that states may condemn abandoned railroad lines. See *Chicago & N.W. Transp.* v. *United States*, 678 F.2d 665, 667, 669 (7th Cir. 1982). See also J.S. App. A38 (comments of the Association of American Railroads).

rail service pursuant to pre-abandonment offers of purchase or subsidy, does not establish federal control with respect to post-abandonment transfers of railroad lines.[9]

Furthermore, the Act and its legislative history are entirely silent on the question of preemption of state condemnation. Since Section 10905 expressly contemplates that an offer of financial assistance could be made by "a government authority" (49 U.S.C. (Supp. V) 10905(d)(1)), such silence on a matter as fundamental as condemnation " 'strongly suggests that Congress did not intend' " to displace state power (*United States* v. *Bass*, 404 U.S. 336, 350 (1971), quoting *Rewis* v. *United States*, 401 U.S. 808, 812 (1971)) or "significantly change[ ] the federal-state balance" (404 U.S. at 349; footnote omitted). Indeed, Section 10905 explicitly allows an offeror to "withdraw his offer within 10 days of the Commission's decision [on the conditions and amount of compensation]" (49 U.S.C. (Supp. V) 10905(f)(2)). By this provision, Congress presumably intended that the situation would return to the status quo ante and that the offeror would be able to invoke whatever preexisting rights it might have -- including, in the case of a state, the right of condemnation.

The court of appeals' decision creates — apparently in perpetuity — a no-man's land in which abandoned rail lines

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[9]As this discussion makes clear, the court of appeals' decision is a far cry from a "logical extension" (Mot. to Aff. 19) of *Chicago & N.W. Transp.* v. *Kalo Brick & Tile Co.*, *supra*. In *Kalo Brick*, the Court held that the ICC's exclusive authority to regulate abandonment preempts a state court judgment for damages based on the discontinuance of rail service. In contrast to the present case, the Court in *Kalo Brick* found that the state award of damages "impose[d] sanctions upon a regulated carrier for doing that which only the Commission * * * has the power to declare unlawful or unreasonable" (450 U.S. at 324) and rested on "precisely the sorts of concerns that Congress intended the Commission to address in weighing abandonment requests from the carriers subject to its regulation" (*id.* at 326-327; footnote omitted).

may not be regulated by the ICC or condemned by the state.[10] To create a special class of property thus exempt from normal processes of government regulation is unwise and unwarranted. Rather, federal and state authority in this area should be "reconcile[d]" (*Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware, supra*, 414 U.S. at 127) by holding that Section 10905 grants exclusive authority to the ICC over pre-abandonment transfers to preserve continued and uninterrupted railroad operations, but does not prevent the states from condemning rail lines on which service has been abandoned pursuant to ICC approval.

3. The court of appeals was led to its preemption holding by its conclusion (J.S. App. A7-A8) that the provisions for purchase or subsidy in Section 10905 were designed to be the exclusive means for acquiring a rail line in order to assure service to shippers. The court inferred such exclusivity from the time limits and valuation procedures specified in Section 10905.

However, nothing in the Act suggests that these provisions were meant to create an exclusive method for assuring rail service to shippers after a railroad has abandoned that service. Section 10905 simply provides one mechanism to assist those who seek to continue existing service; it allows them to take steps to acquire the line prior to abandonment and thus assure uninterrupted service. But there is no indication that Congress intended the possibility of pre-abandonment acquisition (under federal law) to displace all possibilities of post-abandonment acquisition (under state law). And the time limits and valuation procedures contained in Section 10905 were merely designed to regulate the

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[10]The court of appeals' opinion furnishes no guidance on such questions as the length of time following abandonment that state condemnation is preempted or whether and in what situations a change of circumstances would enable the state to exercise its condemnation power.

acquisition of lines prior to abandonment. They have nothing to do with post-abandonment acquisitions, and do not in any way imply that pre-abandonment offers of financial assistance are to operate to the exclusion of post-abandonment acquisitions.

a. As described above (see pages 2-3, *supra*), the process for resolving offers of financial assistance under Section 10905 is to last no longer than 110 days. During this time the issuance of a certificate of abandonment is postponed (49 U.S.C. (Supp. V) 10905(d)). Because a carrier cannot terminate service until the certificate of abandonment is issued (see, *e.g., Gibbons* v. *United States*, 660 F.2d 1227, 1232-1236 (7th Cir. 1981)), the effect of an offer of subsidy or purchase is to delay abandonment for up to 110 days.

The legislative history of the statute[11] shows that Congress intented to limit the duration of this deferral of abandonment in order to reduce the burdens on the carrier. Congress generally sought to "expedite[ ] abandonment proceedings by specifically setting forth time periods within which the Commission must act upon abandonment applications * * *." H.R. Conf. Rep. No. 96-1430, 96th Cong.,

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[11]Section 10905 was adopted in its current form in the Staggers Rail Act of 1980, Pub. L. No. 96-448, Section 402(c), 94 Stat. 1942. As originally enacted in 1976, Section 10905 allowed a shipper to cause abandonment to be delayed for six months by offering to subsidize or purchase a rail line authorized for abandonment, but the offer did not bind the railroad to sell or provide service under a subsidy. See Section 802 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 127, 146, originally codified at 49 U.S.C. 1a. Congress subsequently recodified that provision, without substantive change, as 49 U.S.C. (Supp. II) 10905. See Pub. L. No. 95-473, 92 Stat. 1405; *Chicago & N.W. Transp.* v. *United States*, 582 F.2d 1043, 1048 (7th Cir.), cert. denied, 439 U.S. 1039 (1978). The Staggers Rail Act of 1980 replaced that provision with a new Section 10905 that requires a rail carrier to sell the line or provide service under a subsidy if the offeror meets specified statutory standards. See H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 125 (1980).

2d Sess. 125 (1980); see 49 U.S.C. (Supp. V) 10904(b) and (c). With particular regard to Section 10905, Congress designed the 110-day provision to "protect[ ] carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process." H.R. Conf. Rep. No. 96-1430, *supra*, at 125. The background of this consideration is explained in the House Report:

> An enormous amount of time, effort, and expense has been expended contesting abandonments. Few challenges have been successful. * * *
>
> * * * * *
>
> [It is necessary to] avoid[] expensive protracted litigation * * * [and to] provide[] the carrier desiring to abandon a line a vehicle for prompt abandonment.

H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. 43 (1980). See also S. Rep. No. 96-470, 96th Cong., 1st Sess. 39-41 (1979); 126 Cong. Rec. S14002 (daily ed. Sept. 30, 1980) (remarks of Sen. Cannon) ("[t]he abandonment provisions * * * should eliminate much of the cost, delay, and uncertainty involved in abandonment proceedings").[12]

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[12]This situation was also described in *Chicago & N.W. Transp.* v. *United States*, 582 F.2d 1043, 1045-1046, 1049 (7th Cir.), cert. denied, 439 U.S. 1039 (1978):

> [A rail carrier seeking abandonment] would find itself enmeshed in "drawn-out hearings before the Interstate Commerce Commission." * * * The Senate Committee on Commerce * * * recognized [in 1975] that the abandonment problem plagued the entire railroad industry * * *[,] that "the regulatory climate constrained management's ability to * * * abandon obsolete properties and lines," and * * * that "the railroad industry should not be forced to continue to internalize all losses from branch line operations * * *."
>
> * * * * *
>
> Congress * * * determin[ed] to grant relief from the prolonged administrative proceedings that had attended abandonment and discontinuance.

Thus, Section 10905 is directed to delays that occur in the abandonment process. Because a carrier must maintain service until a certificate of abandonment is issued (see page 12, *supra*), such delays impose a significant burden on the carrier to continue operations that it is seeking to terminate as unprofitable and unnecessary. Section 10905 addresses this problem by limiting the postponement of an abandonment certificate to a maximum of 110 days.

State condemnation of already abandoned rail lines does not conflict with this congressional purpose. Once the process under Section 10905 has been completed without a purchase or subsidy, the carrier is granted a certificate of abandonment and is free to cease rail service. State condemnation of a rail line that has been abandoned cannot, by definition, interfere with the purpose of Section 10905 to diminish delay in the issuance of the abandonment certificate that relieves the carrier of its obligation under federal law to continue rail operations.[13]

b. The court of appeals was also incorrect in concluding (J.S. App. A8) that state condemnation "would circumvent the Commission's determination of value" of the Hayfield

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[13]We note that the facts of this case are unusual in one respect. Typically, a carrier that abandons a rail line simply leaves in place the track and other permanent physical facilities that had been used in providing service. Here, in contrast, appellee sought to remove these materials for use in another project but was enjoined from doing so by the temporary restraining order entered by the state court. Because the parties have not addressed the issue, we take no position on the propriety of the state injunction in light of either the provisions of Section 10905 or the specific orders of the Commission in this case (see Mot. to Aff. 17 n.16). We likewise take no position on the issue of the availability or amount of any "damages due CNW on account of delay" (J.S. App. A11) that the court of appeals remanded to the district court.

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ALEXANDER L. STEVAS,

No. 82-1579

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HAYFIELD NORTHERN RAILROAD COMPANY, INC.
Appellant,

and

STATE OF MINNESOTA,
Appellant/Intervenor,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT BRIEF OF APPELLANTS

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QUESTION PRESENTED

The question presented is whether 49 U.S.C. §10905 preempts the exercise of sovereign power of eminent domain over an abandoned railroad line where a railroad has abandoned a rail line in Minnesota under the following conditions:

(1) the Interstate Commerce Commission has given its approval,

(2) the ICC has relinquished all jurisdiction and interest in the rail line, and

(3) a statutorily authorized rail company has properly invoked Minnesota condemnation law in order to recommence rail service to citizens in Minnesota.

LIST OF PARTIES

In addition to the captioned parties, the States of Iowa and Wisconsin filed pleadings *amicus* in support of the joint petition of the Hayfield Northern and the State of Minnesota for rehearing and rehearing en banc.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT BRIEF OF APPELLANTS

OPINIONS BELOW

The opinion of the court of appeals (J.S.App., A1-A11) affirming the order of the district court is reported at 693 F.2d 819. The order of the district court granting summary judgment to Chicago and North Western (J.S.App., A13-A16) is not reported.

JURISDICTION

The judgment and opinion of the court of appeals were entered on December 3, 1982. The motion for rehearing, timely filed, was denied on January 18, 1983 (J.S.App., A16-A17). A notice of appeal to this Court was filed on February 22, 1983 (J.S.App., A17-A18). The Jurisdictional Statement was filed and docketed on March 25, 1983. Probable jurisdiction was noted on October 3, 1983. Jurisdiction is conferred on this Court by 28 U.S.C. 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Minn. Stat. §222.27 (1982) provides as follows:

> *Power to acquire property* — Every foreign and domestic railroad corporation shall have the power to acquire, by purchase or condemnation, all necessary roadways, spur and side tracks, right of ways, depot grounds, yards, grounds for gravel pits, machine shops, warehouses, elevators, depots, station houses, and all other structures necessary or convenient for the use, operation, or enjoyment of the road, and may make with any other railroad company, such arrangements for the use of any portion of its tracks and roadbeds as it may deem necessary.

Minn. Stat. §300.04 (1982) provides as follows:

> *State and local control; eminent domain* — The state shall at all times have the right to supervise and regulate the business methods and management of any such corporation and from time to time to fix the compensation which it may charge or receive for its services. Every such corporation obtaining a franchise from a city shall

be subject to such conditions and restrictions as from time to time may be imposed upon it by such municipality. Every such corporation may acquire by right of eminent domain such private property as may be necessary or convenient for the transaction of the public business for which it was formed. No street railway company shall have or exercise such right within the limits of any city.

49 U.S.C. §10905 (*Offers of Financial Assistance to Avoid Abandonment and Discontinuance*) is set forth in J.S.App., A-20.

49 U.S.C. §10903 (*Authorizing Abandonment and Discontinuance of Railroad Lines and Rail Transportation*) is set forth in J.S.App., A-25.

Article 6, Section 2 of the United States Constitution provides as follows:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article 1, Section 8 of the United States Constitution provides as follows:

> "Congress shall have power . . . [To] regulate Commerce . . . among the several states . . ."

STATEMENT OF THE CASE

I. INTRODUCTION

Appellant Hayfield Northern Railroad Company (Hayfield Northern) and appellant/intervenor State of Minnesota (Minnesota) appeal from the judgment and opinion of the United States Court of Appeals declaring that Minnesota law providing for the taking of abandoned railroad property by eminent domain is preempted by the Interstate Commerce Act (ICA). 49 U.S.C. (Supp. V) 10905.

II. BACKGROUND

This case concerns an abandonment of 19.2 miles of rail line in rural southeastern Minnesota. This rail segment (Hayfield segment) intersects Hayfield. Hayfield lies 25 miles north of the Iowa border, 70 miles south of St. Paul, Minnesota, and 20 miles southwest of Rochester, Minnesota. Hayfield's existence as a farming center (population 1,243) is attributed to Chicago and North Western Transportation Company's (CNW) (originally Chicago Great Western) initiating rail service to Hayfield in 1855, placing of a division point at Hayfield in 1902, and constructing a roundhouse in the 1930's, which has since been closed. In addition to being a farming center, Hayfield is the home of Power-Span, a manufacturer of concrete power poles for the utility industry. These poles may exceed 90 feet in length.

III. THE MINNESOTA STATUTE

Minnesota has delegated to Hayfield Northern the power to condemn abandoned rail lines. Minn. Stat. §§300.04 and 222.27 (1982). This power has been delegated to rail corpora-

tions in Minnesota since 1879. This power may be exercised by any railroad corporation whether a Minnesota citizen or a citizen of a foreign jurisdiction.[1] Similar statutes are found in many states.[2]

IV. THE FEDERAL SCHEME

The Staggers Rail Act of 1980 amended the Interstate Commerce Act (ICA). These amendments changed the procedures for obtaining a certificate of abandonment from the Interstate Commerce Commission by railroads desiring to quit unprofitable lines. The ICA, as amended by the Staggers Act, provides that a rail line subject to Interstate Commerce Commission (ICC) jurisdiction may be abandoned, or operations on that line discontinued, "only if the Commission finds that the present or future public convenience and necessity require or permit abandonment." 49 U.S.C. (Supp. V) 10903. The ICA provides that the ICC shall publish in the Federal Register its finding that abandonment is permissible. "Within 10 days following the publication, any person may offer to pay the carrier a subsidy or offer to purchase the line." 49

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[1] CNW has been delegated this power.

[2] See, e.g., Ala. Code §10-5-1, Alaska Stat. §09.55.240, Ariz. Rev. Stat. Ann. §12-1111, (West), Ga. Code §94-301, Hawaii Rev. Stat. §101-4, Idaho Code §7-701, Iowa Code §371.6, Kan. Stat. Ann. §§26-101 and 66-501, Me. Rev. Stat. Ann. tit. 35, x 651, Md. Ann. Code art. 23, §193, Mass. Gen. Laws Ann. ch. 160, §82, (West), Miss. Code Ann. §77-9-183, Mo. Rev. Stat. §523.010, Mont. Code Ann. §§69-14-513, Neb. Rev. Stat. §74-301, Nev. Rev. Stat. §37.010, N.H. Rev. Stat. Ann. §371.1, N.J. Rev Stat. §48:12-35.1, N.M. Stat. Ann. §42A-2-1, N.Y. Railroad Law §16, N.C. Gen. Stat. §62-220, N.D. Cent. Code §35-15-02, Ohio Rev. Code Ann. §4955.02, Okla. Stat. tit. 66, §51, R.I. Gen. Laws §37-6-26, S.C. Code Ann. 58-17-1200 (Law. Coop.), S.D. Codified Laws Ann. §49-16A-75, Tenn. Code Ann. §65-6-128, Va. Code §56-347, Wash. Rev. Code §81.36.010, W. Va. Code §31-2-2, Wis. Stat. §32.02, Wyo. Stat. §1-26-201.

U.S.C. (Supp. V) Section 10905(c). The Commission is authorized to postpone the issuance of the certificate of abandonment to permit negotiations if a "financially responsible person (including a government authority) has made a reasonable offer of subsidy or purchase." 49 U.S.C. (Supp. V) 10905(d).

If the parties are unable to come to terms, they may request the Commission to establish a price or subsidy. 49 U.S.C. (Supp. V) 10905(e). This request must be made within 30 days of the initial offer (*id.*). Within 60 days of this request the Commission must establish the amount of subsidy or purchase. 49 U.S.C. (Supp. V) 10905 f(1)(A). The Commission's determination is binding (*id.*). However, the offeror "may withdraw his offer within 10 days of the Commission's decision." 49 U.S.C. (Supp. V) 10905 (f)(2). If the offer is withdrawn a certificate of abandonment immediately issues (*id.*). Accordingly, 49 U.S.C. (Supp. V) 10905 requires that a subsidy or purchase to avoid abandonment or discontinuance be reached within 110 days from the date of publication in the Federal Register.[3] Rail property so purchased or subsidized avoids abandonment, and regulated rail service continues. A purchaser who acquires rail property under Section 10905 "may not transfer or discontinue service on the line for two years after the sale and may not transfer the line to anyone other than the transferor carrier for five years after the sale. §10905 (f)(4), (5)" (J.S.App., A6-A7).

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[3] Before the Staggers Rail Act amendments to 49 U.S.C (Supp. V) 10905 there was no provision for the Commission to set terms for subsidy or purchase. See discussion of history of Section 10905, *infra*, at 16-19.

V. FACTS OF CASE

The facts are not in dispute and are set forth in the opinion of the court of appeals (J.S.App., A1-A11).

A. Pre-Abandonment Facts

On January 30, 1981, Chicago and North Western Transportation Company (CNW) filed an application for a certificate of abandonment with the ICC to abandon a rail line, including a 19.2 mile segment (Hayfield segment), which runs through rural Hayfield, Minnesota (J.S.App., A2). This segment lies totally within Minnesota. A local shippers group (Shippers Group) rallied to oppose the abandonment (*id.*).

An Administrative Law Judge determined that the public convenience and necessity permitted an abandonment of the Hayfield line (*id.*). The Shippers Group made an offer to subsidize the line. The Commission found that the Shippers Group was a "financially responsible person" within the meaning of Section 10905(d). Accordingly, the Commission delayed the issuance of the certificate of abandonment as required under the procedures of Section 10905.

The Shippers Group and CNW were unable to come to terms (*id.*). The Shippers Group then asked the Commission to set the amount of subsidy.[4] 49 U.S.C. (Supp. V) Section 10905(e) (*id.*). In its determination of the amount of subsidy, the Com-

[4] "Soon after making the subsidy offer the Shippers Group filed an administrative appeal of the Administrative Law Judge's decision authorizing abandonment. The Commission denied the appeal and the Shippers Group filed a petition for review in . . . [the United States Court of Appeals for the Eighth Circuit] . . . [A]fter unsuccessfully seeking a stay of the order permitting abandonment, the Shippers Group withdrew their appeal of the substantive decision" (J.S.App., A2).

mission calculated the net liquidation value of the Hayfield line to be $1,791,345. See 49 U.S.C. (Supp. V) 10905(d)(2)(A), 10905(f)(1)(B); and 49 C.F.R. §1121.44 (c)(1952) (*id.*). The Shippers Group then withdrew its offer, as was its right under Section 10905(f)(1)(C)(2) (*id.*). The certificate of abandonment issued on November 17, 1981 (*id.*). This abandonment complied with all abandonment procedures required by the Interstate Commerce Act.

B. Post-Abandonment Facts

On March 31, 1982, Hayfield Northern Railroad Company, Inc., (Hayfield Northern), a Minnesota public service corporation with the delegated power to condemn abandoned rail lines for rail purposes under Minnesota law (Minn. Stat. §§300.04 and 222.27 (1982)), was formed by some members of the Shippers Group.[5] Hayfield Northern immediately brought suit in state court seeking injunctive relief to preserve the Hayfield line intact in order to begin condemnation proceedings.[6] Hayfield Northern also sought a temporary restraining order to forbid the CNW from removing the track and appurtenances from the Hayfield line. After hearing Hayfield Northern and CNW, the state court granted Hayfield Northern a temporary restraining order.

CNW removed the suit to the United States District Court for the District of Minnesota and moved to dismiss on the ground that Section 10905 preempts state law authorizing

[5] The Shippers Group and Hayfield Northern are distinct legal entities.

[6] CNW had contracted to upgrade track in Iowa. It planned to salvage and use the Hayfield track in this upgrading program (J.S.App., A3). In early 1983, CNW removed the track from the Hayfield segment.

condemnation of abandoned rail lines for railroad purposes. The State of Minnesota then intervened "to defend the constitutionality of its condemnation law as applied" (J.S.App., A3).

The district court entered summary judgment in favor of CNW, holding that Section 10905 preempts state condemnation. The district court also dissolved the injunction (*id.*).

Hayfield Northern appealed to the United States Court of Appeals for the Eighth Circuit "and moved for a stay pending appeal and an expedited appeal. After argument . . . [the court of appeals] granted the motions upon the posting of a $100,000 bond" (*id.*).

After argument on the merits, the court of appeals affirmed the judgment holding that Section 10905 "preempts Minnesota condemnation law when a Minnesota railroad company attempts to condemn the track and right of way of a properly abandoned rail line in order to continue rail service on that line"[7] (*id.*).

The court of appeals remanded the cause to district court "for a determination of the amount of damages due CNW on account of delay." The court of appeals also dissolved its previously entered stay (*id.*).

The joint petition for rehearing filed by the Hayfield Northern and State of Minnesota was denied on January 19, 1983 (*id.* at A16-A17). The States of Wisconsin and Iowa had supported the petition for rehearing. On January 22, 1983, Hayfield Northern and the State of Minnesota petitioned the court of appeals to stay the mandate. This petition was denied as were the Hayfield Northern's and State of Minnesota's petitions to this Court to stay the mandate. (*id.* at A26-A28).

[7] At the time of the writing of the court of appeals decision, rail service had been discontinued for 10 months, and, therefore there was no service to continue.

SUMMARY OF ARGUMENT

The eminent domain authority of the State of Minnesota may be properly exercised on property that once was a rail line in order to rededicate that property to rail service. This power is left undisturbed by the Staggers Rail Act amendments to the Interstate Commerce Act. The language of the Act supports this conclusion, as does the legislative history. Indeed, the Interstate Commerce Commission agrees: "the disposition of rail property after an effective certificate of abandonment has been exercised is a matter beyond the scope of the Commission's jurisdiction, and within a State's reserved jurisdiction. Questions of title to, and disposition of the property are matters subject to State law." *Abandonment of Railroad Lines and Discontinuance of Service*, 365 I.C.C. 249, 261 (1981). The courts have also assumed that eminent domain authority of a state may be exercised on a rail line after the ICC has relinquished all jurisdiction and interest in the rail line. The court of appeals' decision stands alone in holding that this traditional state power is preempted. This decision is unsound, both in law and in policy. The decision in effect creates a new class of property, abandoned rail property, that is not subject to federal regulation and yet cannot be condemned by a state. The court of appeals' decision undermines eminent domain, an essential attribute of a sovereign state that is "necessary for the proper performance of governmental functions." *Georgia v. City of Chattanooga*, 264 U.S. 472, 480 (1924).

ARGUMENT

I. THE STAGGERS RAIL ACT AMENDMENTS TO THE INTERSTATE COMMERCE ACT LEAVE INTACT THE INHERENT STATE POWER TO CONDEMN PROPERTY THAT USED TO BE A RAIL LINE REGULATED BY THE FEDERAL GOVERNMENT.

Congress has neither expressed nor implied an intent to override a state's sovereign power to condemn for a public purpose, and has not even hinted that abandoned rail property should be exempted or insulated from a State's exercise of its inherent power of eminent domain. The provisions of Minnesota law that the district court and the court of appeals found to be preempted are no less than Minnesota's traditional authority to exercise or delegate the power of eminent domain over real property. Congress left this sovereign power of eminent domain intact when it enacted the Staggers Act amendments to the Interstate Commerce Act.

A. The Language of the Statute Refers Solely to Matters That Occur Before Abandonment.

A railroad abandonment may be defined as the cessation of rail service that "terminates a railroad's public service obligation." *Gibbons v. United States*, 660 F.2d 1227, 1234 (7th Cir. 1981); 49 U.S.C. (Supp. V) 10903. When a certificate of abandonment is effective, the rail provider is relieved of its obligations to provide rail service on the abandoned rail line. Rail line so abandoned loses its character as rail property and becomes ordinary real property. *Common Carrier Status of States*, 363 I.C.C. 132, 135 (1980), aff'd *sub. nom. Simmons v. ICC*, 697 F.2d 326 (D.C. Cir. 1982) ("when a rail

line has been fully abandoned, it is no longer a rail line and the transfer of the line is not subject to our jurisdiction"). Before the Hayfield segment was dedicated to rail use it was mere property, which, like other property, was subject to Minnesota legal process, including the power of eminent domain. When the Hayfield segment was dedicated to rail use in the 1800's, Minnesota ceded its power to the federal government on that line. Now that the Hayfield segment has been removed from interstate commerce by the act of abandonment, this segment is once again mere real property that, like other real property, may be acquired by eminent domain for a public purpose.

Section 10905, evidenced by its heading and its terms, refers to matters that occur before the effective date of abandonment. It provides a vehicle to avoid abandonment. The heading of the statute is particularly edifying: "Offers of financial assistance to avoid abandonment and discontinuance". All events contemplated by Section 10905 occur within the federal regulatory environment, as these events occur before abandonment and before the line is removed from interstate commerce. When the abandonment is effective, ICC jurisdiction ends as there is no rail property to regulate. The court of appeals contended that there is a difference between Commission "jurisdiction" and frustrating the congressional objective in enacting Section 10905 (J.S.App., 10-11). The Solicitor General, however, expressing the view of the United States, found that no "federal or statutory programmatic interest of the United States would be materially affected by the exercise of a state's condemnation powers in this case." Brief of the Solicitor General as *amicus* at the invitation of

the Court to express the view of the United States, at 6. The Solicitor further argues that state condemnation should be allowed on an abandoned rail line (*id.*).

As the discussion under legislative history below demonstrates (*infra* at 16-19), the concern of Section 10905 is to permit rail carriers a prompt and easy exit from unprofitable lines, thereby relieving the carrier from protracted abandonment proceedings and the expense of providing service on unprofitable lines. Section 10905 does extend to the Commission the authority to set terms for subsidy or purchase (see discussion, *supra*, at 6) before the Commission can permit abandonment. This pre-abandonment authority of the Commission, which was enacted for the benefit of local communities like Hayfield, does not mean that the congressional purpose was to insulate rail line from post-abandonment acquisition by the use of state eminent domain authority, forever. Section 10905 does not concern itself with what happens to the track and right-of-way after the certificate of abandonment is effective. After abandonment, the line and appurtenances are a matter of federal indifference.

A state condemnation in this case could not interfere with the efficient abandonment process dictated by the Interstate Commerce Act, since it quite properly would follow the abandonment. Accordingly, the state condemnation desired in this case has no effect on any federal objectives as once the certificate issues the federal interest is at an end until such time a new certificate of public convenience and necessity is issued to run trains again on the Hayfield segment. 49 U.S.C. (Supp. V) 10901. Moreover, there is no evidence of federal design to preempt.

B. Congress' Extension of the Commission's "Exclusive" and "Plenary" Authority Over Abandonments to Include the Authority to Set a Purchase Price on Rail Lines in Order That Those Lines Would Avoid Abandonment and Continue in the Federal Scheme Was Not Intended to Oust the State's Traditional Sovereign Authority to Condemn Rail Lines Which Have Been Abandoned and Thereby Taken Outside the Federal Scheme.

It is readily conceded that the Interstate Commerce Commission has exclusive authority to regulate abandonments. Section 10905, as part of that authority, permits the Commission to set terms for the transfer of rail property before abandonment. Section 10905 does no more than provide "a method for transferring the rail properties prior to their downgrading [i.e. before the line is abandoned]". H.Rep. No. 96-1035, 96th Congress 2d Sess. (1980), reprinted in U.S. Code Cong.Ad. News 3988. It was not the intent of Congress or the purpose of Section 10905 to insulate property that used to be rail line from state eminent domain authority. The legislative history is silent on the effect of Section 10905 on a state eminent domain acquisition after an abandonment under the ICA. Preemption is not to be presumed from this silence. The objective of Section 10905 was not to thwart state eminent domain authority, but to compel railroad good faith bargaining with a financially responsible entity in the hope that abandonment could thereby be avoided.

1. The legislative history of §10905 is silent on its effect on state eminent domain authority, and preemption is not to be presumed.

This Court has warned of the danger of deriving intent through a process of negative inference. *Cleveland v. United States*, 329 U.S. 14, 22 n.5 (1946) (per Justice Rutledge, concurring). Accordingly, " 'an unexpressed purpose to nullify . . . [state power] is not lightly to be attributed to Congress' " *California Retail Liquor Dealers Ass'n v. Medcal Aluminum, Inc.*, 445 U.S. 97, 103-104 (1980), quoting *Parker v. Brown*, 317 U.S. 341, 351 (1943). "Preemption of state law by federal statute [is] not favored 'in the absence of persuasive reasons either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.' " *Chicago & North Western Transportation Company v. Kalo Brick and Tile*, 450 U.S. 311, 317 (1981), quoting *Florida Lime and Avocado Growers Inc. v. Paul*, 373 U.S. 132, 142 (1963). The silence in this case cannot be read to find a congressional purpose to preempt.

The legislative history indicates that Congress extended the power of the Commission in abandonment matters to include the authority to set terms, for purchase or subsidy, to combat railroad bad faith, and to provide a mechanism in which rail service could continue without interruption. This extension of power to the Commission did not mean that Congress intended to oust the states from exercising eminent domain authority after abandonment. The summary procedures of Section 10905 requiring the Commission to determine value of property from afar in a mere 60 days does not give strength to the conclusion drawn by the court of appeals that Section 10905 provides the exclusive method in which to transfer the rail line. Moreover,

Section 10905 contemplates that a governmental entity may be a party to a Section 10905 valuation. Congress must be assumed to recognize that an appropriation in the short period mandated by Section 10905 could not always be accomplished by a state entity. Accordingly it is difficult to infer that these procedures were the exclusive method for transferring rail line.

Congressional silence on the question of the vitality of state eminent domain authority after Section 10905 was enacted lends strength to the opposite conclusion, i.e. no preemption. Indeed, the very lack of congressional debate on this subject cuts against any inference that Congress intended to preempt. Lack of debate on this fundamental state power contrasts markedly with the *amicus* participation of sixteen states supporting appellants' appeal. Furthermore, the purpose of Congress in enacting Section 10905, as developed below, was not to create a special class of property immune from state eminent domain but to force good faith negotiations between the abandoning railroad and a prospective purchaser.

2. Staggers Act Amendments to Section 10905 were enacted to curb railroad bad faith negotiations with prospective purchasers and to provide a mechanism to transfer the line to the prospective purchaser before abandonment, thereby avoiding an interruption in rail service.

"Entry into and withdrawal from a railroad operation* are events heavily freighted with the public interest and pervasively subject to public regulation." *Gibbons v. United States*, 660 F.2d 1227, 1234 (7th Cir. 1981). In order to protect the public interest from serious injury from the termination of**

rail service, the Commission has been granted authority to provide a method to set terms for the transfer of rail line before service is terminated. 49 U.S.C. (Supp. V) 10905. The Staggers Rail Act amendments to the ICA are the latest congressional effort to add efficiency to the procedure in which a carrier can abandon "unprofitable" lines, while providing a method to protect the public from cessation of rail service. See generally *Simmons v. Interstate Commerce Commission*, 697 F.2d 326 (D.C. Cir. 1982).

The Staggers Act was preceded by the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, Section 802, 90 Stat. 127, 146, originally codified at 49 U.S.C. 1a (4-R Act), which "made significant changes to the procedures by which a carrier was able to abandon service along the rail line." *Simmons v. Interstate Commerce Commission*, 697 F.2d 326, 329 (D.C. Cir. 1982). The 4-R Act amended §1a of the Interstate Commerce Act, the predecessor of 49 U.S.C. 10905, by providing for a short delay before a certificate of abandonment would issue in order to permit interested parties to come forward with offers to continue rail service. See *Chicago and North Western Transportation Company v. United States*, 582 F.2d 1043, 1046-49 (7th Cir.) *cert. denied*, 439 U.S. 1039 (1978). Under the 4-R Act, if the Commission determined that the interested party was "financially responsible" it was empowered to postpone the issuance of the certificate of abandonment for up to 6 months in order that the offeror and the abandoning railroad could reach an agreement on subsidy or purchase, thereby avoiding cessation of rail service (*id.*).

The Commission found that the purpose of the 4-R Act's negotiating provisions was not being served, since railroads negotiated in bad faith and waited for the 6 month period to

pass in order to be able to extract an excessive price or abandon without reaching an agreement of subsidy or purchase with the offeror (*id.*). See also *Chicago and North Western Transp. v. United States*, 678 F.2d 665, 667 (7th Cir. 1982). In order to overcome this problem of railroad bad faith, the Commission adopted rules to meet this problem that gave the Commission the power to refuse to issue the certificate and to reopen the underlying abandonment beyond the 6 month period or directing that service continue for an additional year. *Chicago and North Western Transp. v. United States*, at 582 F.2d 1046-1049.

The Seventh Circuit struck down these Commission rules holding that the Commission had no authority to extend the 6 month period beyond the language of the statute (*id.* at 1049). The court buttressed its holding by noting the absence of a "cram-down" provision in Section 1a. The Seventh Circuit noted the legislative history of this provision at 582 F.2d at 1049, n.9.

> "We note that acting ICC Chairman Charles Klapp recognized that the language of the statute means what it says when, in testifying before a subcommittee of Congress in June 1976, he stated that an amendment to §1a(6) he was supporting
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> . . . by removing the phrase 'not to exceed 6 months,' gives the Commission the discretion to extend for a longer period of time the issuance of an abandonment certificate if the circumstances of a particular case make such an additional extension reasonable. This amendment addresses the very real problem of a railroad simply refusing to negotiate in good faith for the statutory 6-month period and thus successfully preventing the making of a subsidy agreement.
>
> His amendment would have given the Commission authority to extend the negotiating period but to prescribe terms for continued operation if no subsidy agreement was reached within six months. Hearings on Rail Amendments of 1976 Before the House Subcommittee on Trans-

> portation and Commerce of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess. 48 (1976). Congress did not accept Chairman Klapp's proposal and was presumably not persuaded by his policy argument."

When the Staggers Act amendments were promulgated, Congress apparently was persuaded that the Commission should be able to set terms to protect the public from interrupted service. The Staggers Act, (Section 10905(c)-(f)), contains a "cram-down", as suggested by Commissioner Klapp, whereby the Commission will set a binding price. Section 10905(c)-(f) originated as Section 202(c) of Senate bill S. 1946. The Senate Report of this bill echoes Chairman Klapp's concerns.

> "Section 202(c) deals with the purchase or subsidization of rail lines which have been approved for abandonment * * * The Commission now has the power to stay the effective date of an abandonment for 6 months while negotiations to subsidize or purchase a line are conducted. However, if such negotiations are not successful, the abandonment becomes effective at the end of 6 months. Thus, a railroad unwilling to consider subsidy or sale of the line can frustrate the intention of Section 10905 of 49 U.S.C. by simply refusing to negotiate in good faith." S.Rep. No. 96-470, 96th Congress., 1st Sess. 40 (1979); and see H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 125 (1980). (The Conference Report accompanying the Staggers Act in its final form indicated that the Senate provision in Section 202 was adopted by the Congress.)

It is tenable that the purpose of the cram-down was the reaction of Congress to a railroad industry that was abandoning lines without good faith bargaining, as contemplated

by the 4-R Act, between railroad and the affected public. It is untenable that Congress by enacting the cram-down to protect the public from interrupted rail service meant to preempt state eminent domain authority to acquire rail lines in order to recommence rail service after abandonment. This conclusion is supported explicitly by the Interstate Commerce Commission.

C. The Interstate Commerce Commission And The Courts Have Agreed That The Staggers Act Has No Preemptive Effect On The Exercise of Eminent Domain On Abandoned Rail Property.

1. The ICC has authoritatively construed the Staggers Act amendments to the Interstate Commerce Act as permitting acquisition of abandoned rail lines under state eminent domain authority.

It is well established that in questions of statutory construction, the interpretation of the agency charged with administration of the statute is entitled to great deference. *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 381 (1969). *See also Miller v. Youakim*, 440 U.S. 125, 145, n. 25 (1979). This deference is particularly necessary where, as here, the agency is taking the first step toward implementing a new approach to regulatory reform mandated by Congress. *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Atchison, Topeka & Santa Fe Railway v. ICC*, 580 F.2d 623, 629 (D.C. Cir. 1978), and is particularly mandated "when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co. v. United States*, 288 U.S.

294, 315 (1933) (per Justice Cardozo). The court of appeals recognized that deference is to be given to the Interstate Commerce Commission, the agency entrusted in enforcing the Interstate Commerce Act (J.S.App., A8). But instead of referring the matter to the agency, the Eighth Circuit grounded its decision, in part, on what it "believed" was the agency's position.[8] The court of appeals' interpretation was incorrect.

The Commission was recently asked by the State of Wisconsin to find that the court of appeals' decision in this case was incorrect, i.e. that a state power of eminent domain may be exercised on abandoned rail lines after the provisions of Section 10905 have been satisfied. Wisconsin was concerned that the court of appeals decision would prevent it from exercising its sovereign power of eminent domain to acquire abandoned rail lines. By statute Wisconsin is prohibited from acquiring rail property through the procedures of Section 10905, but can only acquire property that has been certified abandoned under Section 10903. Wis. Stat. §85.09 (West 1982) (set forth in J.S.App., A66). Property acquired through the procedures of Section 10905 avoids abandonment under Section 10903.

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[8] The court of appeals remarked:

"We do not believe, however, that the Commission has interpreted Section 10905 in the manner in which the appellants contend" (J.S.App., A8).

"We do not believe that this language amounts to a declaration that a party who has invoked Section 10905 may also invoke state condemnation proceedings" (J.S.App., A10).

"Similarly, we do not believe that *Finance Docket No. 28990F, Common Carrier Status of State, State Agencies and Instrumentalities, and Political Subdivisions*, 363 I.C.C. 132 (1980) aff'd *sub. nom. Simmons v. Interstate Commerce Commission*, 697 F.2d 326 (D.C. Cir. 1982) compels a different conclusion (J.S.App., A10).

The Commission responded:

> "We wish to point out to WisDot that after all conditions to an abandonment have been complied with and the certificate is effective, federal interest and Commission jurisdiction end." *C&NW Transp.—Abandonment—in Waukesha, Jefferson and Dane Counties, Wisc.*, I.C.C. Docket No. AB-1 (Subd.-No. 144) (May 5, 1983) (*Waukesha*) (set forth in appendix to Appellants Joint Supplemental Memorandum to Jurisdictional Statement, at A5).

This Commission "interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions enactment to Congress." *United States v. American Trucking Ass'n*, 310 U.S. 534, 549 (1940). See discussion at 18-19, *supra*, on the Commission part in enacting §10905.

2. The Commission has drawn a bright line: a rail line before an abandonment is the subject of federal interest and Commission jurisdiction but after a certificate issues it is no longer subject to Commission jurisdiction or federal interest.

The Commission has "exclusive" and "plenary" authority over abandonments, *Chicago and North Western Transportation Company v. Kalo Brick and Tile Company*, 450 U.S. 311, 320, 321 (1981), but this authority ends after the abandonment is consummated. Before consummation of the abandonment, ICC jurisdiction and federal interest persist. After issuance of the certificate of abandonment, ICC jurisdiction and federal interest end. The procedures set forth in Section 10905 are, accordingly, the exclusive method to acquire a rail line from the period that the notice of abandonment is

published in the Federal Register until the certificate issues.[9] However, once the certificate issues the property is no longer rail property and is subject to the traditional exercise of the sovereign power of eminent domain. *Waukesha, supra,* is the most recent of a line of ICC decisions addressing the boundary of Commission jurisdiction over abandoned rail lines.

In *Finance Docket No. 28990F, Common Carrier Status of States, State Agencies and Instrumentalities and Political Subdivisions,* 363 I.C.C. 132 (1980), aff'd *sub. nom. Simmons v. ICC,* 697 F.2d 326 (D.C. Cir. 1982), the Commission stated that "when a rail line has been fully abandoned, it is no longer a rail line and the transfer of the line is not subject to our jurisdiction". The court of appeals attempts to distinguish this language by stating that there is a difference between Commission jurisdiction and frustrating the congressional objective in enacting Section 10905. As discussed above, at 16-20, the congressional objective in Section 10905 has nothing to do with prohibiting the exercise of eminent domain upon abandoned rail lines. Section 10905 was enacted in order to force the nation's railroads to negotiate in good faith with interested parties to encourage continued rail service. The distinction offered by the court of appeals that there is a difference between ICC jurisdiction and congressional objectives leads to the anomalous result that an abandoned rail line is outside the ambit of federal jurisdiction and beyond the power of state eminent domain forever. In effect, the court of appeals has created a special class of property that is owned unfettered by federal regulation or state process. This special class of property gives to the owner, the CNW, one attribute of sovereignty, thereby creating " a void in the republic".

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[9] See discussion at 5-6, *supra,* concerning the procedures dictated by Section 10905.

The Commission promulgated rules under Section 10905 in *An Abandonment of Rail Lines and Discontinuance of Service*, 365 I.C.C. 249, 261 (1981) (49 C.F.R. 1121) and noted that it had been granted only limited jurisdiction under Section 10905 that requires sale and continued rail service.

> "In all other instances, the disposition of rail property after an effective certificate of abandonment has been exercised is a matter beyond the scope of the Commission's jurisdiction, and within the state's reserved jurisdiction. Questions of title to, and disposition of property are matters subject to state law."

The court of appeals' attempt to discount this language of the Commission as being responsive only to the very narrow question whether lessors of property along the rail line are entitled to the right of first refusal to buy the property is unconvincing. (J.S.App., A10).

The quoted Commission statement was made in the context of Section 10905 offers of financial assistance (*id.* at 257). As such, this statement has general applicability to Commission jurisdiction and federal interest after abandonment. Moreover, this language is consistent with other Commission pronouncements on this subject and, accordingly, is the considered wisdom of the Commission. The above Commission regulations also addressed the concerns of the Association of American Railroads (AAR) that "[n]othing prevents a state from exercising its rights under the Staggers Act and then walking away from the proceeding or decision of the Commission regarding the valuation or purchase price, and beginning a condemnation proceeding in a local state court seeking favorable treatment by such court." (This statement is set forth in the J.S.App., A38). The AAR suggested that prospec-

tive State purchasers who make an offer for a rail line under §10905 be required to make a 25% non-refundable deposit to the carrier to discourage them from obtaining an ICC valuation, and thereafter walking away (49 U.S.C. 10905(f)(2)) to commence state condemnation proceedings. The ICC rebuffed this suggestion as discriminatory against states and effectively eliminating their right to "walk away". It is significant that the exact issue raised here was posed to the Commission and the Commission gave no relief from the present situation that the AAR desired to forestall by the imposition of an economic barrier. The court of appeals ignored this by simply stating "that this does not demonstrate that the Commission agreed with the Association's (or the appellants') interpretation of the statute" (J.S.App., at A10).[10]

3. The courts have assumed that rail lines are subject to the legitimate processes of state law after a certificate of abandonment issues.

In a recent Seventh Circuit decision, *Chicago and North Western Transportation Co. v. United States*, 678 F.2d 665 (1982) (per Judge Posner), the court was called upon to fathom the meaning of the term "fair market value," under the 1980

[10] *See also, Modern Handcraft, Inc.—Abandonment in Jackson County, Missouri*, 363 I.C.C. 969 (1981), where the Commission once again articulated that the purpose of its "exclusive" and "plenary" jurisdiction over abandonments was to provide the public with a method of protection against cessation of rail service. The Commission observed that it would "not allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law where there is no overriding Federal interest in interstate commerce." The court of appeals endeavored to distinguish *Modern Handcraft* as that decision concerned condemnation for a non-rail use, not for continued rail service (J.S.App., A9).

Staggers Rail Act Amendments to 49 U.S.C. §10905. In the course of its decision the court assumed that the power of eminent domain is left intact by the Staggers Act amendments *id.*, at 667. This assumption appears to have been determined after careful analysis by the court and is logically necessary to the conclusion reached. The court of appeals' characterization of the Seventh Circuit assumption as dictum is correct but does not relegate that dictum from its scholarly base to a mere meaningless remark.

Similarly, the District of Columbia Circuit in *Simmons v. Interstate Commerce Commission*, 697 F.2d 326, 331 (D.C. Cir. 1982) has cited approvingly Commission rules that instruct that the Commission lacks "jurisdiction to regulate state acquisition of abandoned rail line, since by the process of abandonment the line lost its status as rail property." *Simmons* involved the limited exemption from common carrier status under the Interstate Commerce Act to states that merely own rail lines and provide financial assistance to service carriers. *Simmons* found that the Staggers Act amendments to Interstate Commerce Act were in furtherance of the congressional policy of placing the states at the forefront of retaining local rail service (*id.* at 329). Under this view every effort of a state to preserve rail service—whether before or after abandonment—is to be encouraged.[11]

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[11] Other courts when confronted with the issue whether state process can be exercised on a rail line have indicated that a state is powerless to exercise jurisdiction until the certificate of abandonment issues. See e.g., *Kansas City Area Transportation Authority v. Ashley*, 555 S.W.2d 9 (Mo. 1977), *cert. denied*, 434 U.S. 1066 (1977); *New Orleans Terminal Company v. Spencer*, 366 F.2d 160 (5th Cir. 1966), *cert. denied*, 386 U.S. 942 (1967). These cases are pre-Staggers Act.

D. The interpretation of the court of appeals that the Staggers Act impliedly ousts the states from exercising their traditional power of eminent domain authority over real property, a power that was present under previous law, is flawed because the court of appeals failed to differentiate pre-abandonment and post-abandonment federal interest.

Preemption occurs when a state statute obstructs the "accomplishment and execution of the full purposes and objectives of an Act of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). By exercising a granted power, Congress may supersede state law by stating that it is the congressional intent to preempt state law. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. ——, 103 S.Ct. 1713, 1722 (1983). When Congress enacted the Staggers Act amendments to Section 10905, the question of the continued vitality of state eminent domain authority over abandoned rail lines was not addressed. Preemption may be found nonetheless by implication (*id.*). The court of appeals found that the precise time schedule dictated under Section 10905 evidenced a pervasive federal response demonstrating an intent by Congress that Section 10905 provide the exclusive mechanism for transfer of the Hayfield segment.

Citing and quoting from the leading and recent decisions of this Court, the court of appeals found that a state condemnation 1) conflicts with the federal scheme; 2) stands as an obstacle to the full purposes and objectives of Congress; and 3) reveals the same purpose as Section 10905 (J.S.App., A4-A7). The court of appeals reached its flawed conclusion that state eminent domain authority is preempted by failing

to distinguish between pre-abandonment and post-abandonment federal interest. The scheme embodied in Section 10905 pervasively operates within the pre-abandonment period. Section 10905 does not extend the duration of ICC authority; it does extend more power to the Commission during an interval in which the ICC has traditionally exercised preemptive power.

Before a certificate of abandonment is effective, the ICC has exclusive and plenary authority. *Chicago & North Western Transp. Co. v. Kalo Brick & Tile*, 450 U.S. 311, 320 (1981). Once the certificate is effective the federal interest is at an end. When the state condemnation action is commenced the federal scheme will have run its course. In these circumstances, there is no actual conflict.[12]

The Solicitor General states that "the abandonment authority of the Interstate Commerce Commission does not extend beyond the point at which the certificate of abandonment becomes effective" and no federal interest is endangered by a state condemnation of an abandoned rail line. *Amicus* Brief of the Solicitor General filed in response to the Court's invitation for the view of the United States at the jurisdictional level, at 6. In short, the state condemnation does not conflict

[12] The court of appeals found that the benefit of the 110 day time period would be lost (J.S.App., A-7). This benefit would not be lost, as the abandonment is not delayed by a state condemnation—condemnation follows abandonment. A railroad is able to cease operations on "unprofitable" lines and escape operating costs, the primary purpose of Section 10905, at the same time whether a state condemnation action is instituted or not. The court also thought that a condemnation would circumvent the benefit of the ICC valuation (J.S.App., A8). The benefit of the ICC valuation is not an issue of preemption but one of issue preclusion. Whether the ICC valuation is entitled to res judicata, collateral estoppel, or weight of some lesser force is not before the Court.

with federal law or stand as an obstacle to the accomplishment of any federal object.

In addition, there is not an identity of state and federal purpose embodied in the two schemes. The federal scheme is designed to have rail property avoid abandonment. A purchase pursuant to the procedures mandated by Section 10905 keeps the rail line within ICC jurisdiction. The line continues charged with common carrier obligations. In contrast, the state scheme affects property that has not avoided abandonment (an abandoned segment)—i.e. ordinary real property. Before an abandoned segment can be returned to service, a fresh certificate of public convenience and necessity must issue anew from the ICC. 49 U.S.C. (Supp. V) 10901. Additionally, the very property that is acquired is different. A purchaser pursuant to the provisions of 10905 acquires the same incidents of title in the rail line that the abandoning railroad possessed. For example, where the abandoning railroad title is subject to a condition that ownership remain in the railroad for so long as the property is used for rail purposes, the Section 10905 acquirer obtains title subject to the same condition. In a state condemnation, the railroad and all persons and entities that appear on title of record are joined as parties and the condemnor, after paying just compensation, obtains title in fee simple absolute.

The federal and state laws are harmonious. This Court has instructed that when federal law is exercised for one purpose, state law undertaken for a different but consistent purpose is not preempted. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 445-46 (1960). Accordingly, where, as here, the federal and state scheme may be reconciled, the proper approach is to harmonize the schemes and not to oust the state

law. *Merrill Lynch, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973); *DeCanas v. Bica*, 424 U.S. 351, 357 n.5 (1976). The federal and state schemes here compel reconciliation as a matter of statutory construction and preemption analysis. Furthermore, as a matter of sound policy it would be unwise to permit the court of appeals holding to stand.

E. The Court of Appeals' Holding That a Rail Line That is Abandoned is Beyond State Condemnation Authority When That Authority is Invoked to Restore Rail Service is Unsound in Law as it is in Principle.

An abandoned rail line is no longer rail property; it is ordinary property. By insulating this property from condemnation, the court of appeals has created a new class of property. The Solicitor General found this to be startling and unwise. Brief of Solicitor General, at Jurisdictional Statement level, at 10-11. Under the court of appeals' rationale, the Hayfield segment can be sold for railroad purposes, if the CNW chose, but may not be condemned by state authority for the same purpose. This same property, however, could be condemned by state eminent domain authority for any number of non-rail purposes, including a scenic railroad under the court's rationale.[13] This result is anomalous. Moreover, it will frustrate both interests of the sovereign states and the federal government.

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[13] While the holding of the court of appeals is that state eminent domain authority is preempted when this authority is attempted to be exercised on abandoned rail line in order to continue rail service on that line (J.S.App., A2), the court held open the question whether this authority would be similarly preempted when the purpose of the exercise of eminent domain is a public use other than a rail use. (J.S.App., A9). The rationale of the court of appeals would appear to arguably extend to a non-rail public use.

The Eighth Circuit decision severely undercuts state rail banking efforts. Many states now have programs in which abandoned rail lines are acquired and set aside for rail use in the future. Any rail line abandoned through the procedures dictated by Section 10905 would be exempted from a condemnation acquisition for rail banking purposes. As Section 10905 requires the line to continue in rail use. Section 10905 does not permit the dormancy contemplated by rail banking.[14] Under this holding, an important state objective is thwarted. Moreover, the federal interest in placing the states at the forefront of the federal effort to restore rail service is frustrated. *Simmons, supra,* at 697 F.2d 329. This policy is encouraged by federal funding.[15]

The court of appeals' decision ignores the practical reasons why a state would not always be able to participate in a Section 10905 acquisition. The most obvious example is statutory prohibitions that some states have, as Wisconsin does, that prohibits a State from acquiring a rail line prior to consummation of the abandonment. Wisc. Stat. 85.09 (West 1982) (J.S.App., A66). Furthermore, a State may wish to remain the purchaser of last resort or refrain from competing with a private entity in a Section 10905 acquisition.

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[14] Rail banking does not fit the public use definition of Section 10906, since it is a rail use.

[15] *See* 4-R Act, Pub. L. No. 94-210, §§501-509, 805, 90 Stat. 31, 66-76, 139-43; Staggers Act, Pub. L. No. 96-448, §§401-402, 404-406, 94 Stat. 1895, 1939-45, 1945-47, cited in *Simmons, supra,* at 697 F.2d 329, n.13.

CONCLUSION

The judgment below should be reversed and the case remanded to the district court to fashion an appropriate remedy.

Respectfully submitted.

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No. 82-1579

IN THE

Supreme Court of the United States

October Term, 1983

HAYFIELD NORTHERN RAILROAD COMPANY, INC.,

Appellant,

and

STATE OF MINNESOTA,

Appellant/Intervenor,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Appellee.

On Appeal From the United States Court of Appeals for the Eighth Circuit

BRIEF FOR APPELLEE CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

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QUESTIONS PRESENTED

The questions presented are:

1. Whether 49 U.S.C. §10905 preempts Minnesota condemnation law when a Minnesota railroad company attempts to condemn the track and right of way of a properly abandoned rail line in order to continue rail service on that line.

2. Whether Hayfield Northern Railroad Company, Inc.'s use of a state court injunction to prevent Appellee's removal of its rail assets and contemplated action to condemn the subject track and right of way constitute impermissible collateral attacks on the orders and decisions of the Interstate Commerce Commission.

Rule 28.1 list of Appellee's parent companies, subsidiaries and affiliates:

Des Moines and Central Iowa Railway Company (subsidiary)

Fort Dodge, Des Moines & Southern Railway Company (subsidiary)

Trailer Train Company (affiliate)

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IN THE

Supreme Court of the United States

October Term, 1983

No. 82-1579

HAYFIELD NORTHERN RAILROAD COMPANY, INC.,

Appellant,

and

STATE OF MINNESOTA,

Appellant/Intervenor

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Appellee.

On Appeal From the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR APPELLEE CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

OPINION BELOW

The opinion of the court of appeals affirming the order of the district court is reported at 693 F.2d 819, and appears as Appendix A to Appellants' Jurisdictional Statement (J.S. App. A1-A11). The order of the district court

granting Appellee's motion for summary judgment and dismissing the complaint is not reported, and appears as Appendix C to Appellants' Jurisdictional Statement (J.S. App. A13-A16).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provisions, Article I, Section 8, Clause 3 and Article VI, Clause 2 of the United States Constitution, are set forth in the Motion to Affirm, at 2, and in the Joint Brief of Appellants, at 3.

The relevant statutory provisions are reproduced in the Appendix to Appellants' Jurisdictional Statement. 49 U.S.C. §10903 (Supp. V) appears therein as Appendix G (J.S. App. A25-A26), and 49 U.S.C. §10905 (Supp. V) appears therein as Appendix F (J.S. App. A20-A24).

Minn. Stat. §222.27 (1982) and Minn. Stat. §300.04 (1982) are set forth in Appellants' Jurisdictional Statement (J.S. 2 and 3, respectively), and in the Joint Brief of Appellants (at 2, 2-3, respectively).

STATEMENT OF THE CASE

Introduction

This is an appeal from a decision of the United States Court of Appeals for the Eighth Circuit affirming the order of the United States District Court for the District of Minnesota which dismissed an adversary proceeding instituted by Hayfield Northern Railroad Company, Inc. (hereinafter "Hayfield Northern") against Chicago and North Western Transportation Company (hereinafter "C&NW") on the ground that 49 U.S.C. §10905 (Supp.

V) preempts Minnesota condemnation law when a Minnesota railroad company attempts to condemn the track and right of way of a properly abandoned rail line in order to continue rail service on that line.

Proceedings Below

On January 30, 1981, C&NW filed an application with the Interstate Commerce Commission (hereinafter the "Commission"), pursuant to 49 U.S.C. §10903 (Supp. V)[1] of the Interstate Commerce Act, for a certificate of abandonment of its railroad line between Oelwein, Iowa and Randolph, Minnesota.[2] Several shippers from southern Minnesota (hereinafter the "Shippers Group") opposed the abandonment of a 19.2-mile segment of the line between Dodge Center and Sargeant, Minnesota, and between Hayfield and Waltham, Minnesota (hereinafter the "Hayfield segment").

The Administrative Law Judge (hereinafter the "ALJ") found that the public convenience and necessity permitted abandonment of the entire line.[3] One of the factors the ALJ weighed in determining that continued operation of the line would impose an undue burden on C&NW and on interstate commerce was the "opportunity cost"[4]

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[1]We will hereinafter omit "(Supp. V)" in references to the current version of the Interstate Commerce Act.

[2]See *Chicago & N.W. Transp. Co.-Abandonment Between Oelwein, Ia. and Randolph, Mn.*, I.C.C. Docket No. AB-1 (Sub-No. 113F) (1981), *petition for review dismissed sub nom. Brownsdale Cooperative Ass'n v. Interstate Commerce Commission*, No. 81-2333 (8th Cir. Jan. 14, 1982).

[3]*Id.* The ALJ's decision was decided July 10, 1981 and served July 15, 1981. (Joint Lodging ("J.L.") 23). Administrative and judicial decisions in the abandonment proceedings which have not been printed in the parties' appendices are reproduced in the Joint Lodging.

[4]Opportunity cost has been defined as the income that a carrier forfeits by continuing to devote capital assets to an unproductive line when alternative use of those assets could be turned to economic gain. *Id.* (J.A.21; J.L.18, 19). See *Texas & Pac. Ry. Co. Abandonment*, 363 I.C.C. 666, 671 (1980).

to C&NW. *Id.* (Joint Appendix ("J.A.") 22; J.L. 19, 21). Contemporaneus with the ALJ's decision, which was administratively final, the findings were published in the Federal Register[4] on July 15, 1981, which among other things, required that if continued rail service was contemplated by any person, certain procedures must be undertaken in accordance with 49 C.F.R. §1121.38 (1981).

Thereafter, the Shippers Group, pursuant to 49 U.S.C. §10905, submitted an offer of financial assistance[5] to subsidize operation of the Hayfield segment of the line. The Commission found the Shippers Group to be financially responsible persons within the meaning of 49 U.S.C. §10905. (Mot. to Aff. App. A19-A20). When the Shippers Group and C&NW could not agree on subsidy terms, the Shippers Group requested that the Commission, pursuant to Section 10905(e), establish the conditions and amount of subsidy. As a part of the Commission's determination of the subsidy amount, the Commission found the net liquidation value of the Hayfield segment to be $1,791,354[7]. Soon thereafter, the Shippers Group filed an administrative appeal of the ALJ's decision authorizing abandonment (J.L. 39-55), which appeal was denied by the Commission (J.L. 64).

Shortly after the Commission announced its findings on net liquidation value and subsidy, the Shippers Group

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[4]46 Fed. Reg. 36,763 (No. 135) (1981) (Mot. to Aff. App. A1-A3).

[5]The Shippers Group's offer of financial assistance (Mot. to Aff. App. A4-A17) was made pursuant to 49 C.F.R. §1121.38 (1981).

[7]Mot. to Aff. App. A25-A26, A32. It was necessary to determine net liquidation value before the subsidy amount could be calculated. The subsidy should equal "the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line. . . ." 49 U.S.C. §10905(d)(2)(A). One element of the "value of the line" is the net liquidation value of the rail properties on the line. 49 C.F.R. §1121.44(c) (1981).

withdrew its offer of financial assistance on the Hayfield segment of the line (Mot. to Aff. App. A33-A34), and filed an appeal in the United States Court of Appeals for the Eighth Circuit seeking a reversal of the ALJ's decision authorizing abandonment.[8] The Shippers Group did not appeal the Commission's determination of net liquidation value or subsidy amount.

In early January, 1982, after unsuccessfully seeking a stay of the order authorizing abandonment,[9] the Shippers Group withdrew its appeal in the court of appeals of the substantive decision authorizing abandonment.[10]

In reliance on the finality of the administrative proceedings and the absence of any offers to purchase or subsidize the Hayfield segment of line for continued rail operation, C&NW entered into various contracts with the State of Iowa and certain Iowa shippers involving substantial upgrading of trackage in Iowa. C&NW planned to salvage and utilize the rail from the Hayfield segment of the line to apply to these projects. (J.S. App. A3).

On March 31, 1982, approximately three months after the substantive appeal was dismissed, and approximately six months after the Commission's determination of net liquidation value and subsidy amount, members of the Shippers Group formed the Hayfield Northern Railroad

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[8]See *Brownsdale Cooperative Ass'n v. Interstate Commerce Commission*, No. 81-2333 (8th Cir. filed Dec. 7, 1981) (J.L. 66-78).

[9]The Commission denied the Shippers Group's petition to stay the effective date of the abandonment certificate by decision dated December 14, 1981 (J.L.80). The Commission rejected the Shippers Group's contention that grant of the stay would not harm C&NW, stating "CNW is operating a marginal line and is incurring substantial opportunity cost and a grant of this stay would cause [C&NW] to continue to incur this cost." (J.A.33; J.L.80). See also J.A.33-J.A.34.

[10]*Id.* Judgment of dismissal was entered January 14, 1982. (J.A. 35-J.A.36).

Company, Inc., which, under Minnesota law,[11] possessed condemnation powers to acquire property for railroad purposes. On the same day, Hayfield Northern filed suit in the Dodge County (Minnesota) District Court, alleging that it desired to condemn the track, appurtenances and right of way on the Hayfield segment of the line and seeking a temporary restraining order preventing C&NW's removal of rail, ties and facilities from the segment of line. (J.A.1-J.A.3). The state court granted Hayfield Northern's motion for a temporary restraining order. (J.A.3-J.A.5).

C&NW removed the suit to the United States District Court for the District of Minnesota[12] (J.A.5-J.A.9), and the State of Minnesota intervened to defend the constitutionality of its condemnation statute as applied (J.A.15-J.A.16). The district court[13] granted C&NW's motion for summary judgment, dissolved the temporary restraining order, and dismissed Hayfield Northern's complaint with prejudice, holding that, on the facts presented, 49 U.S.C. §10905 preempts state condemnation procedures. (J.S. App. A13-A16).

Hayfield Northern appealed the district court's order[14] (J.A.16-J.A.17) and moved for a stay pending appeal and for an expedited appeal. After argument, the court of appeals granted Hayfield Northern's motions upon the posting of a $100,000 bond. (J.A.17-J.A.18).

On December 3, 1982, the court of appeals affirmed the judgment of the district court (J.S. App. A1-A11),

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[11]Minn. Stat. §222.27 (1982); Minn. Stat. §300.04 (1982).
[12]Jurisdiction was based on diversity of citizenship.
[13]The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.
[14]The jurisdiction of the United States Court of Appeals for the Eighth Circuit was invoked pursuant to 28 U.S.C. §1291.

concluding that "49 U.S.C. §10905 (Supp. IV 1980) preempts Minnesota condemnation law when a Minnesota railroad company attempts to condemn the track and right of way of a properly abandoned rail line in order to continue rail service on that line." (J.S. App. A1-A2).

Appellants' joint petitions for rehearing and rehearing en banc were denied by the court of appeals on January 18, 1983. (J.S. App. A16-A17). On February 9, 1983, the court of appeals denied Appellants' joint petition to stay the issuance of mandate pending appellate proceedings to this Court. (J.S. App. A26). On February 10, 1983, Appellants' joint application for stay of the court of appeals' mandate was denied by Circuit Justice Harry A. Blackmun of this Court. (J.S. App. A27). On February 22, 1983, Justice Rehnquist denied Appellants' renewed application for a stay of the court of appeals' mandate (J.S. App. A28), after receiving the amicus curiae memorandum of the Solicitor General setting forth the view of the United States (J.S. App. A30-A31). On March 7, 1983, this Court denied Appellants' renewed application for a stay of the court of appeals' mandate. (J.S. App. A29). Probable jurisdiction was noted on October 3, 1983.

The Staggers Rail Act

The legislative history and structure of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, *et seq.* (hereinafter the "Staggers Rail Act"), is selectively set out in the Government's brief. Brief at 4-5, 18-24. The Interstate Commerce Act (see Act of Feb. 4, 1887, ch. 104, 24 Stat. 379) is widely recognized as being among the most pervasive and comprehensive of federal regulatory schemes. *Chicago & N.W. Transp. Co. v. Kalo Brick &*

Tile Co., 450 U.S. 311, 318 (1981). The 1887 Act did not subject railroad abandonments to the jurisdiction of the Commission. The Commission's authority over abandonments was established by the Transportation Act of 1920, ch. 91, 41 Stat. 456, 49 U.S.C. §1(18)-(22) (1925 ed.). See *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, *supra*, 450 U.S. at 319-320. The Commission's authority over abandonments represented Congress' effort to ensure that "interstate commerce [was protected] from undue burdens" that could be imposed by conflicting state regulations concerning the continuation or discontinuation of rail service. *Colorado v. United States*, 271 U.S. 153, 162 (1926). Since the Transportation Act of 1920, no rail carrier has been permitted to abandon a line unless it first obtains a certificate from the Commission that the present or future public convenience and necessity permit such an abandonment. See 49 U.S.C. §10903(a).

The abandonment provisions of the Transportation Act of 1920 remained substantially unchanged until the 1970s, when the economic decline of the nation's rail industry necessitated the participation of the federal government to ensure the continuation of vital service and to restore the rail industry to a level of financial health sufficient to meet future needs for investment capital. See, e.g., H.R. Rep. No. 1482, 95th Cong., 2d Sess. 5-11, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7505; S. Rep. No. 499, 94th Cong., 1st Sess. 2-8, 39-44 (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 14. See also *Simmons v. Interstate Commerce Commission*, 697 F.2d 326, 328 (D.C. Cir. 1982). The financial disaster suffered by the Penn Central Transportation Co. and other northeastern railroads in the early 1970s made Congress

aware of the part played by the forced continuation of excessive and uneconomical lines of railroad. *In re Penn Central Transp. Co.*, 382 F. Supp. 831, 836-837 (E.D. Pa. 1974); *Chicago & N.W. Transp Co. v. United States*, 582 F.2d 1043, 1045 (7th Cir. 1978).[15]

Congress was also aware that there were approximately 22,500 miles of uneconomical branch lines throughout the country and that these unprofitable lines cost the nation's railroads over $140 million annually. S. Rep. No. 499, 94th Cong., 1st Sess. 39-44 (1975). The Senate Committee on Commerce reported that "[t]he railroad industry has been unable to adjust to changing market conditions because its facilities are fixed in place, because the regulatory climate constrained management's ability to merge facilities and abandon obsolete properties and lines . . ." *Id.* at 3. Congress concluded that "the railroad industry should not be forced to continue to internalize all losses from unnecessary branch lines, further jeopardizing the industry's already precarious economic health." S. Rep. No. 499, 94th Cong., 1st Sess. 44 (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 58.

The Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976, Pub L. No. 94-210, §§802, 809(c), 90 Stat. 31 et seq., originally codified at 49 U.S.C. §1a (1976 ed.) (hereinafter the "4-R Act") with the overriding objective of redeveloping the nation's railroad system through reform of the economic regulatory system. Included in the 4-R Act was a detailed framework to govern the abandonment of lines and discontinuance of service. Although the congressional focus was primarily upon the

[15]See generally *Hearings on Railroad Amendments of 1976 Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 158-162 (1976).

abandonment problem, Congress recognized discontinuance of service as part of the same problem and treated it like abandonment in the statute. *Chicago & N.W. Transp. Co. v. United States, supra,* 582 F.2d at 1046.

The 4-R Act repealed the abandonment provisions in former §1(18)-(22) of the Interstate Commerce Act and provided a new abandonment and discontinuance procedure in new §1a. The Commission would first determine whether a proposed abandonment or discontinuance of service would be in the public interest. Upon a determination that it was, the Commission would issue a certificate of abandonment unless it found that a financially responsible party had made an offer of financial assistance to enable the rail service to continue via purchase or subsidy. If such an offer was made, the parties were required to negotiate for a period not to exceed six months, but if no rail continuation subsidy or purchase was successfully negotiated the Commission was required to issue a certificate of abandonment.[18] See generally *Chicago & N.W. Transp. Co. v. United States, supra,* 582 F.2d at 1046, 1049.

The 4-R Act provided for advance notice to the public of the lines the nation's rail carriers intended to abandon. Section 1a(2). Section 1a(5) required each carrier to publish and maintain system diagram maps to show the lines for which the carriers planned to submit abandonment applications. A rail carrier was required to post, publish and serve notice to the public of its intent to file an aban-

[18]Unlike the provisions of the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 986 (codified, as amended, at 45 U.S.C. §701 *et seq.*) (hereinafter the "3-R Act"), applicable only to the northeastern railroads, the 4-R Act did not require rail service continuation either by compulsory sale or subsidy. It imposed compulsory negotiation rather than compulsory sale or subsidy.

donment application thirty days in advance of filing its abandonment application. Rail carriers which had filed abandonment applications were also required to promptly provide, to any party considering offering financial assistance, necessary data to determine the amount of assistance that would be required to continue rail service. Section 1a(6).

Notwithstanding the regulatory reforms made in the 4-R Act, including the improvements made to the abandonment process, the financial health of the railroad industry continued to decline following the passage of the 4-R Act. H.R. Rep. No. 1035, 96th Cong., 2d Sess. 38, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978, 3983. Congress found, *inter alia*, that rail industry earnings were the lowest of any transportation mode and were insufficient to generate funds for necessary capital improvements. H.R. Rep. No. 1035, 96th Cong., 2d Sess. 53, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978, 3998. By 1985, the rail industry would experience a $16 to $20 billion capital shortfall. H.R. Conf. Rep. No. 1430, 96th Cong. 2d Sess. 3, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978, 4110, 4111.

The rail industry's inadequate financial performance had led to nearly $4 billion in deferred maintenance. 126 Cong. Rec. 7272 (1980); S. Rep. No. 470, 96th Cong., 1st Sess. 3 (1979). Congress observed that many railroads were caught in a vicious cycle. Depressed earnings had deprived railroads of the ability to make improvements which were in part needed to reduce costs and improve service. S. Rep. No. 470, 96th Cong., 1st Sess. 3 (1979).

In 1980, Congress passed the Staggers Rail Act, which radically changed many of the provisions of the then exist-

ing Interstate Commerce Act, and insofar as is relevant here, substantially modified the abandonment process.

By enacting the rail service continuation provisions of Section 10905 of the Staggers Rail Act, Congress intended to "assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process." H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 125, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978, 4110, 4157.

Under Section 10905, any arrangements for continued rail service via purchase or subsidy are to be completed within 110 days. If the Commission decides to authorize abandonment under Section 10903, its finding is published concurrently in the Federal Register. 49 U.S.C. §10905 (c). The Federal Register notice states that any offers of financial assistance either to subsidize or to purchase the line must be made within 10 days following publication. 49 U.S.C. §10905(c). If the Commission determines within fifteen days of publication that the offeror is financially responsible and that the amount of the offer is adequate, issuance of the certificate of abandonment is postponed pending negotiations between the parties. 49 U.S.C. §10905 (d). If the parties fail to agree on the subsidy or purchase terms within thirty days after the offer is made, the certificate of abandonment is issued unless either party requests that the Commission establish the conditions and amount of compensation (49 U.S.C. §10905(e)), including the price and terms of any offer to purchase which "has been made in order to continue rail service on the line" (49 U.S.C. §10905(f)(1)(C)). If such a request is

made, the Commission must establish the terms of purchase or subsidy within sixty days. 49 U.S.C. §10905(f)(1)(A). The Commission's determination of purchase or subsidy amount as a quasi-condemnation tribunal[17] is binding on both parties, except that the person who has offered to subsidize or purchase the line may withdraw his offer within ten days of the Commission's decision without incurring financial obligation. 49 U.S.C. §10905(f)(2). Thus, under Section 10905, any arrangements for the continued rail service via purchase or subsidy must be completed within the 110 day period set by Congress.

A purchaser of a rail line under Section 10905 may not transfer or discontinue service on the line for two years after the sale and may not transfer the line to anyone other than the carrier from whom it was purchased for five years after the sale. 49 U.S.C. §10905(f)(4). Section 10905(f)(4) stiffens the abandonment requirements for these purchasers and requires service for a minimum two year period.[18] Thus, the process prescribed by Congress protects the general public from unsound operators and from further instability in the transportation network.

In enacting the Staggers Rail Act, Congress provided not only for the forced acquisition of a rail line in connection with an abandonment authorization (Section 10905), but also provided that financially responsible parties could forcibly acquire rail lines prior to a carrier's filing of an

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[17]The Commission has acknowledged that it acts as a quasi-condemnation tribunal as a result of the new procedures established by the Staggers Rail Act. See *Chicago & N.W. Transp. Co. - Abandonment - Between Clintonville and Eland, Wisc.*, AB-1 (Sub-No. 104), 363 I.C.C. 975, 977 (1981).

[18]Normally, a rail carrier may seek to abandon a line after the line has been placed in Category 1 on its system diagram map for four months. See 49 U.S.C. §10904(e)(3).

abandonment application (Section 10910). The purpose of Section 10910 is to provide shipper groups and governmental bodies with an alternative to inadequate rail service or abandonment. Ex Parte 395 (Sub-No. 1), *Feeder Railroad Development Program*, 365 I.C.C. 93 (1981). See also H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 124, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978, 4110, 4156.

Under Section 10910, the Commission can require a carrier to sell a rail line to a financially responsible person if (1) the line appears in Category 1 or 2 of the owning carrier's system diagram map, or (2) the public convenience and necessity, as defined in 49 U.S.C. §10910(c)(1), permit or require the sale of the line. *Feeder Railroad Development Program, supra*, 365 I.C.C. at 93. Section 10910 provides for the determination of net liquidation value by the Commission as a quasi-condemnation tribunal similar to Section 10905. The carrier may be required by the Commission to sell the rail line to a financially responsible person at a price not less than the "constitutional minimum value" (49 U.S.C. §10910(b)(1)), which the statute presumes to be not less than the net liquidation value or the going concern value of the line, whichever is greater. 49 U.S.C. §10910(b)(2). A purchaser of a rail line under Section 10910 must be able to assure adequate transportation over the line for at least three years. (49 U.S.C. §10910(a)(1)(B). Compare with 49 U.S.C. §10905(f)(4)).

In the context of the history and structure of the Staggers Rail Act, Section 10905 represents the exclusive means of forcibly acquiring an intact rail line and right of way in order to continue rail service in connection with federal abandonment proceedings.

SUMMARY OF ARGUMENT

I. The courts below correctly concluded that, on the facts presented, 49 U.S.C. §10905 preempts Minnesota condemnation law when a Minnesota railroad company attempts to condemn the track and right of way of a properly abandoned rail line in order to continue rail service on that line. In enacting the Staggers Rail Act, Congress granted the Commission exclusive and plenary authority to provide for continuation of rail service by subsidy or purchase in connection with rail line abandonments. The history and structure of the Staggers Rail Act demonstrate that, in connection with abandonment proceedings, Section 10905 represents the exclusive means of forcibly acquiring an abandoned rail line and right of way in order to continue rail service on that line. Hayfield Northern had at its disposal, and its principals and incorporators resorted to, the federal statutory mechanism afforded by Section 10905 by which to acquire the Hayfield segment, by purchase or subsidy, in order to continue rail service.

In the context of the history and structure of the Staggers Rail Act, the invocation of Minnesota condemnation law authorizing Hayfield Northern to condemn C&NW's abandoned rail line for continuing rail purposes stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, and is thus preempted. The pervasiveness of the Staggers Rail Act impels the inference that Congress left no room for the states to grant railroad corporations the power to condemn the track and right of way of a properly abandoned rail line for continuing rail purposes.

II. The Interstate Commerce Commission, at the

request of the Shippers Group (which later formed and incorporated Appellant Hayfield Northern), determined the fair market value of the Hayfield segment. The Commission's determination of value was not appealed by the Shippers Group. The court of appeals correctly concluded that there is no reason to allow the Shippers Group, acting through Hayfield Northern, to force C&NW to relitigate the question of value in a state court when Congress has provided an expedited method by which the purchase price of the Hayfield segment may be determined, especially when one determination of that value has already been made by the Commission.

The Commission authorized C&NW's removal of the rail assets on the Hayfield segment. This decision was likewise not appealed by the Shippers Group.

The sole method for enjoining or attacking a final order of the Commission is by appeal to the appropriate federal court of appeals pursuant to 28 U.S.C. §2321(a). The ultimate effect of Hayfield Northern's action is to require C&NW to relitigate the fair market value of the Hayfield segment and to prevent C&NW's removal of the rail assets on the Hayfield segment. Hayfield Northern's contemplated state condemnation action to establish a contrary valuation of the rail assets and use of a state court injunction to prevent C&NW from removing the rail assets constitute impermissible collateral attacks on the unappealed decisions and orders of the Commission.

ARGUMENT

I.

THE INTERSTATE COMMERCE ACT PREEMPTS MINNESOTA CONDEMNATION LAW WHEN A MINNESOTA RAILROAD COMPANY ATTEMPTS TO CONDEMN THE TRACK AND RIGHT OF WAY OF A PROPERLY ABANDONED RAIL LINE IN ORDER TO CONTINUE RAIL SERVICE ON THAT LINE.

Hayfield Northern seeks to acquire C&NW's intact rail line between Dodge Center, Hayfield, Waltham and Sargeant, Minnesota through the exercise of the power granted to Minnesota railroad corporations to condemn property for railroad purposes. Minn. Stat. §222.27 (1982). This contemplated condemnation is in direct conflict with the congressional scheme for abandonment of rail lines and continuation of rail service established by the Staggers Rail Act. That congressional scheme is so pervasive as to impel the inference that Congress left no room for the states to supplement it and that preemption has occurred.

A. The Preemption Doctrine.

Article I, §8, cl. 3 of the United States Constitution (Commerce Clause) provides "[t]he Congress shall have Power . . . [t]o regulate commerce . . . among the several States . . ." It has long been settled law that "there can be no divided authority over interstate commerce, and, . . . the acts of Congress on that subject are supreme and exclusive." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., supra,* 450 U.S. at 319, quoting *Missouri Pac. R. R. Co. v. Stroud,* 267 U.S. 404, 408 (1925). The plenary power of Congress over interstate commerce by

virtue of the Commerce Clause was recognized by this Court as early as 1824 in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

The preemption doctrine derives from the Supremacy Clause of the United States Constitution (art. VI, cl. 2) which states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . ., any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

A state law is "contrary" to a federal statute, and is thus preempted, if the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 153 (1982), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The determination of a state "obstacle" is a two-step process of "first ascertaining the construction of the two statutes [federal and state] and then determining the constitutional question whether they are in conflict." *Perez v. Campbell*, 402 U.S. 637, 644 (1971).

If a federal statute reveals Congress' intent to foreclose all state legislation on the same subject, the state legislation will be deemed "contrary" to the federal statute, and thus preempted. *Fidelity Federal Savings & Loan Association v. de la Cuesta, supra*, 458 U.S. at 153. Congress' intent to "occupy the field" and thereby foreclose all state law on the same subject may be express, explicitly stated in the statute, or implied, implicitly contained in the statute's structure and purpose. *Id.*, quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

> Absent explicitly preemptive language, Congress' intent to supercede state law altogether may be inferred because "the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose."

Ibid. (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Without regard to whether Congress intended to foreclose all state legislation on the same subject, "a state statute is void to the extent that it actually conflicts with a valid statute . . ." *Edgar v. MITE Corp.*, 102 S.Ct. 2629, 2635 (1982). An actual conflict of federal and state statutes may be found either

> when "compliance with both federal and state regulations is a physical impossibility", *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217, 10 L.Ed. 2d 248 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress", *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L. Ed. 581 (1941).

Fidelity Federal Savings & Loan Association v. de la Cuesta, supra, 458 U.S. at 153.

The pervasiveness of the Staggers Rail Act makes reasonable the inference that Congress left no room for the states

to grant railroad corporations the power to condemn the track and right of way of a properly abandoned rail line in order to continue rail service on that line. We turn first to this matter.

B. The Pervasive Federal Scheme of the Interstate Commerce Act.

The Interstate Commerce Act passed in 1887 is widely recognized as being among the most pervasive and comprehensive of federal regulatory schemes. See Act of Feb. 4, 1887, ch. 104, 24 Stat. 379. *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., supra*, 450 U.S. at 318. Beginning with the 1907 decision in *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), this Court has frequently invalidated attempts by the states to impose on common carriers obligations that are plainly inconsistent with the plenary authority of the Interstate Commerce Commission or the congressional policy as reflected in the Interstate Commerce Act. *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., supra*, 450 U.S. at 318.

Congress has granted the Interstate Commerce Commission exclusive and plenary authority to regulate abandonments. See Transportation Act of 1920, ch. 91, 41 Stat. 456, 49 U.S.C. §1(18)-(22) (1925 ed.). See also *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., supra*, 450 U.S. at 320-321. Under the current version of the Interstate Commerce Act, no rail carrier may abandon a line unless it first obtains a certificate from the Commission that the present or future public convenience and necessity permit such an abandonment. 49 U.S.C. §10903(a). This Court has held the exclusive and plenary nature of the Commission's authority to rule on

carriers' decisions to abandon lines is critical to the congressional scheme, which contemplated comprehensive administrative regulation of interstate commerce. *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., supra,* 450 U.S. at 320. The court of appeals properly concluded that the elaborate procedural detail of the scheme by which Congress empowered the Commission to determine continuation of service on rail lines by forced sale or subsidy readily indicates that Congress granted the Commission exclusive and plenary authority to regulate continuation of rail service in connection with abandonments. (J.S. App. A7).

The recent statutory changes to the Interstate Commerce Act (*supra* at 9-14) evinces Congress' intent that the Commission have exclusive and plenary authority over the forced disposition of rail lines for continued rail service following an administrative authorization of abandonment. Congress carefully tailored the Staggers Rail Act to make continued rail service via purchase or subsidy an integral part of the federal abandonment process. (J.S. App A6).

Where Congress has provided for the forced sale of a line prior to an abandonment application being filed (49 U.S.C. §10910) and has provided for the forced sale or subsidy of a rail line following the Commission's authorization of abandonment (49 U.S.C. §10905), the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. *Fidelity Federal Savings & Loan Association v. de la Cuesta, supra,* 458 U.S. at 153; *Rice v. Santa Fe Elevator Corp., supra,* 331 U.S. at 230.

The court of appeals correctly held that the elaborate

procedural detail of the Staggers Rail Act indicates that not only has Congress granted the Commission exclusive and plenary authority to regulate abandonments, *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., supra,* 450 U.S. at 320, Congress also granted the Commission exclusive and plenary authority to provide for continuation of rail service via forced sale or subsidy following its authorization of abandonment. (J.S. App. A7).

C. Minnesota Condemnation Law is an Obstacle to the Accomplishment and Execution of the Purposes and Objectives of Section 10905.

Minn. Stat. §222.27 (1982), which would purport to authorize Hayfield Northern to condemn C&NW's abandoned railroad line for continued rail purposes, stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, and is thus preempted by 49 U.S.C. §10905.

By enacting Section 10905, Congress intended to "assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process." H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 125, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978, 4110, 4157. The Staggers Rail Act was carefully tailored to accomplish that purpose by providing that the forced disposition of rail lines for continued rail service was an integral part of the federal abandonment process.

To allow Hayfield Northern to use state condemnation proceedings to condemn C&NW's right of way and track for purposes of continued rail use would frustrate the ac-

complishment of Congress' purposes in enacting Section 10905. (J.S. App. A7). The benefits of the 110-day abandonment time schedule set by Congress would be lost, since the state condemnation proceedings, once commenced,[19] could take years, and in the meantime the carrier's assets would stand idle and unproductive.[20]

Moreover, at the end of the state condemnation proceedings, Hayfield Northern could abandon the condemnation action and not pay the award.[21] Although C&NW might recover costs and attorney's fees under Minn. Stat. Ann. §117.195 (West 1977), it could recover consequential damages, if at all, only by bringing a separate law suit. See *State v. Savage*, 255 N.W.2d 32 (Minn. 1977). During the pendency of such condemnation proceedings, burdens on both the carrier and interstate commerce would be imposed by the opportunity cost of the idle and unproductive rail assets. *Texas Pac. Ry. Co. Abandonment*, 363 I.C.C. 666, 671 (1980).

Under Section 10905(e), either the carrier or the offeror may request that the Commission set the terms of the pur-

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[19]Hayfield Northern has not yet filed its condemnation action notwithstanding the commencement of this action on March 31, 1982.

[20]To further complicate matters for the carrier seeking abandonment of a line, not one but several railroad company condemnors could be hastily formed, each seeking to condemn the same or different segments of the abandoned line. This situation arose in an action related to this abandonment. Kenerson Railroad Company, Inc., a Minnesota corporation, was formed in early 1982 by shippers seeking to condemn a 20 mile segment of this abandoned line between Kenyon and Randolph, Minnesota. C&NW was again temporarily enjoined by a Minnesota state court judge from removing its railroad track and appurtenances and from disposing its real estate. See *Kenerson R.R. Co., Inc. v. Chicago & N.W. Transp. Co.*, No. 3-82-608 (D. Minn. filed May 17, 1982), *appeal dismissed*, No. 82-1657 (8th Cir. July 8, 1982).

[21]Under Minnesota law, a condemnor may abandon the condemnation proceeding at any time before the parties' rights have "vested". See *County of Hennepin v. Mikulay*, 292 Minn. 200, 210-13, 194 N.W.2d 259, 265-67 (1972); *State v. Myhra G.M.C. Truck & Equipment Co.*, 254 Minn. 17, 18-19; 93 N.W.2d 204, 205 (1958).

chase or subsidy. The Commission's determination is binding on both parties. 49 U.S.C. §10905(f)(2). If Congress' only purpose in enacting Section 10905 was merely to force the carriers to the bargaining table as Appellants suggest (Brief at 19), there would be no need for Congress to have provided for the carriers' ability to request the Commission to set the conditions and amount of compensation of the purchase or subsidy. See 49 U.S.C. §10905 (e) ("If the carrier and a financially responsible person (including a government authority) fail to agree on the amount or terms of the subsidy or purchase, *either party may*, within 30 days after the offer [of financial assistance] is made, *request that the Commission establish the conditions and amount of compensation.*") (Emphasis added). However, in so doing it is clear the Commission's determination of the conditions and amount of compensation was to protect both the shippers and the carriers to avoid continuing legal proceedings.

In this case, Hayfield Northern has not yet filed its condemnation action a year and a half after obtaining the original state court injunction preventing C&NW's removal of its track and reuse of its property. The scarce reusable rail from the Hayfield segment of line was committed by C&NW to fulfill its contracts with the State of Iowa and Iowa shippers to upgrade grain hauling lines in Iowa. (J.S. App. A3). As a result of the instant litigation, the rail upgrading program has been disrupted and C&NW has been substantially delayed from utilizing its salvageable rail and track materials elsewhere on its system.[22] Hayfield Northern has subjected C&NW to the precise "protracted legal proceedings" which the procedures set forth

[22]C&NW completed the salvage of its line on September 30, 1983.

in Section 10905 were clearly designed to avoid. (J.S. App. A7).

Furthermore, the use of state procedures to condemn intact rail lines following abandonment would defeat a congressional goal of the Staggers Rail Act, to-wit, "to assist the railroads of the nation in rehabilitating the rail system in order to meet the demands of interstate commerce and the national defense." H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 3 (1980).

In *State of Maine, Dep't of Transp. v. Interstate Commerce Commission*, 587 F.2d 541, 543-44 (1st Cir. 1978), the carrier's overall financial health was a factor which was weighed in considering whether rail service should be continued.[23] The court stated that in weighing all the relevant factors in an abandonment, the Commission "could conclude that abandonment would bring about offsetting benefits to the financially pressed railroad, *including the ability to utilize the salvageable rails elsewhere on its line.*" *Id.* (Emphasis added.) See also *In re Boston and Maine Corp.*, 596 F.2d 2 (1st Cir. 1979).

C&NW was prevented from recovering and utilizing its salvageable rail and track materials from the Hayfield segment to upgrade its major grain hauling lines in Iowa as a result of the instant litigation. Rather than productively reusing these scarce rail materials, the track appurtenances and right of way sat idle, contrary to the express intent of Congress.

A year before the passage of the Staggers Rail Act, the Commission explicitly recognized that burdens on inter-

[23] Similarly, C&NW's marginal financial condition was expressly considered in the Commission's determination of C&NW's abandonment application. See J.L. 21.

state commerce not only arise from carrier losses sustained from operating unprofitable lines, but also from the dedication of assets to unnecessary lines which assets could be used profitably elsewhere. Ex Parte 274 (Sub-No. 3), *Abandonment of Railroad Lines-Use of Opportunity Costs*, 44 Fed. Reg. 10,807 (1979); *Abandonment of Railroad Lines-Use of Opportunity Costs*, 360 I.C.C. 571 (1979), *aff'd sub nom. Farmland Industries, Inc. v. United States*, 642 F.2d 208 (7th Cir. 1981).

The Commission defined "opportunity cost" as the income that a carrier forfeits by continuing to devote capital assets to a line when alternative use of those assets could be turned to economic gain. *Texas & Pac. Ry. Co. Abandonment*, 363 I.C.C. 666, 671 (1980). The opportunity costs are developed by multiplying an "adequate" rate of return by the net liquidation value of the rail line.[24] *Texas & Pac. Ry. Co. Abandonment*, 363 I.C.C. 666, 671 (1980); Ex Parte 274 (Sub-No. 3B), *Abandonment of Railroad Lines-Use of Opportunity Costs*, 367 I.C.C. 734 (1983).

In *Abandonment of Railroad Lines-Use of Opportunity Costs, supra*, 360 I.C.C. at 577, the Commission concluded:

> [W]e find that opportunity costs must be a factor used in determining whether the public convenience and necessity permits abandonment. This finding reflects our belief that opportunity costs are a real, and in some cases, very significant factor in determining whether the line at issue is imposing a burden on interstate commerce . . . Such evidence may

[24]An "adequate" rate of return is computed by using the findings in the Commission's annual revenue adequacy proceeding adjusted for taxes and inflation. *Id.*

include the costs incurred in keeping assets tied up in less profitable operations as opposed to more profitable uses elsewhere, including nonrail uses.

* * *

We believe that in the abandonment areas we must look ultimately to how productively assets are used. Lines consisting of valuable assets which are underutilized should be allowed to be abandoned *so that those assets may be better used elsewhere.* (Emphasis added).

Under Section 10903 of the Staggers Rail Act, the Commission determines whether the present or future public convenience and necessity permit an abandonment given the respective burdens of the railroad and shippers. The Commission determines whether there are losses incurred by the carrier from operating the line. See 49 C.F.R. §1152.32 (1981). In addition, it determines what income, if any, a carrier forfeits by continuing to devote capital assets to the line when alternative use of those assets could be turned to economic gain. *Texas & Pac. Ry. Co. Abandonment*, 363 I.C.C. 666, 671 (1980). These "opportunity costs" are considered in all abandonment cases in determining whether there is an undue burden on the carrier and on interstate commerce, and whether, therefore, public convenience and necessity permit abandonment. *Id.* See, e.g., J.L.19. Once an abandonment certificate is issued, if a carrier is not able to promptly and productively reuse its capital assets, the Commission's decision authorizing abandonment is unquestionably undermined.

In *Texas & Pac. Ry. Co. Abandonment*, 363 I.C.C. 666, 676 (1980), the Commission recognized that

> [w]hen reusable rail assets are tied up on a line where they are barely used, there is a burden on interstate commerce. That burden is a very real one when, as today, there is a nationwide need for actual rail materials and the funds to purchase rail materials. Thus, the public is harmed by the under-utilization of scarce resources. When, under circumstances such as those shown here, 112-pound rail in good condition is left on a line over which little traffic is moved, we find a significant burden on interstate commerce.

This Court in *Colorado v. United States, supra,* 271 U.S. at 162-163, recognized that "the certificate of abandonment issues not primarily to protect the railroad, but to protect interstate commerce from undue burdens . . . Expenditures in the local interest may be so large as to compel the carrier to raise reasonable rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce." The ability of Hayfield Northern to prevent C&NW from productively reusing its assets—which the Commission explicitly found were needed elsewhere on C&NW's system (see J.L. 21)—by resort to a state court injunction obstructs the accomplishment and execution of the full purposes and objectives of Congress in enacting the Staggers Rail Act. *Fidelity Federal Savings & Loan Association v. de la Cuesta, supra,* 458 U.S. at 153; *Hines v. Davidowitz, supra,* 312 U.S. at 67. Accordingly, the Staggers Rail Act preempts Minnesota condemnation law on the facts of this case.

II.

HAYFIELD NORTHERN'S USE OF A STATE COURT INJUNCTION TO PREVENT C&NW'S REMOVAL OF ITS ASSETS AND CONTEMPLATED ACTION TO CONDEMN THE HAYFIELD SEGMENT CONSTITUTE IMPERMISSIBLE COLLATERAL ATTACKS ON THE COMMISSION'S ORDERS AND DECISIONS.

The court of appeals correctly concluded that there is no reason to allow the Shippers Group, acting through Hayfield Northern, to force C&NW to relitigate the question of value in a state court when Congress has provided an expedited method by which the purchase price of the Hayfield segment may be determined, especially when one determination of that value has already been made.[25] (J.S. App. A8).

The Commission's jurisdiction under Section 10905(f) to establish the amount of compensation was invoked by the principals of Hayfield Northern. In an unappealed Commission order, the Commission determined the fair market value of the subject line was $1,791,354. (Mot. to Aff. App. A32). The Shippers Group had the right to appeal the Commission's valuation if it disagreed with the price (see 28 U.S.C. §§2321(a), 2342), but it chose not to appeal the order.

While persons offering to purchase or subsidize a line may "walk away" from the conditions and compensation established by the Commission without incurring financial liability, pursuant to Section 10905(f), the statutory lan-

[25]At least one court has held that the Section 10905 procedure for the determination of the purchase price of a rail line sought to be abandoned is constitutionally adequate. See *Chicago & N.W. Transp. Co. v. United States*, 678 F.2d 665, 671 (7th Cir. 1982).

guage indicates that the Commission's determination of fair market value or subsidy is "binding" on the parties. 49 U.S.C. §10905(f)(2). The Commission itself has held that:

> A party's only remedy if dissatisfied with our decision [on value or subsidy] is to seek judicial review in a United States Court of Appeals pursuant to 28 U.S.C. 2321(a) and 2342. Under these sections, the court of appeals has exclusive jurisdiction to review, enjoin, set aside or determine the validity of all of our final orders.

Ex Parte 274 (Sub-No. 6), *Abandonment of Railroad Lines and Discontinuance of Service*, 365 I.C.C. 249, 261 (1981).

If the Commission establishes the conditions of purchase or subsidy and the original offer of financial assistance is withdrawn pursuant to Section 10905(f)(2), any other offeror may accept the Commission's conditions of purchase or subsidy not later than 20 days after the date of the decision. 49 U.S.C. §10905(f)(3). The Commission will require the carrier to enter into the purchase or subsidy agreement with the subsequent offeror on the same conditions as previously established by the Commission. *Id.* The Commission's determination of value and conditions for the Section 10905 purchase or subsidy remains binding on the parties regardless of whether the original offeror withdraws its offer. If the parties fail to appeal the Commission's determination of value, it follows that they are prohibited from relitigating that valuation in state court.

Hayfield Northern's contemplated condemnation action in an effort to obtain an independent determination of

value in state court is squarely an impermissible collateral attack on the Commission's unappealed order. Ex Parte 274 (Sub-No. 6), *Abandonment of Railroad Lines and Discontinuance of Service*, 365 I.C.C. 249, 261 (1981). C.f. *Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co., supra; Village of Mantorville v. Chicago, Great Western R. Co.*, 8 F. Supp. 791 (D. Minn. 1934).

Similarly, Hayfield Northern's use of a state court injunction to prevent C&NW from removing its track and appurtenances and selling its right of way on the Hayfield segment of line was an impermissible attack on the Commission's orders in this case.

In the Commission's certificate and decision dated October 7, 1983, C&NW was explicitly authorized to remove its tracks and appurtenances from the subject line. (J.A. 27-28; J.L.62, 64). In a decision issued December 17, 1981, Commission Chairman Reese Taylor denied the Shippers Group's petition for a stay of the abandonment certificate pending appeal stating: "[C&NW] is operating a marginal line and is incurring a substantial opportunity cost and a grant of this stay would cause [it] to continue to incur this cost." (J.A. 33; J.L. 80).

Contrary to both the expressed concern of the Commission and federal law (28 U.S.C. §2321), however, the state court impermissibly prevented C&NW from removing its track and appurtenances and selling its right of way on the Hayfield segment, and directly caused C&NW to continue to incur the very opportunity costs the Commission's abandonment orders were designed to eliminate. The sole method for attacking or enjoining a final order of the Commission is by appeal to the appropriate federal court of appeals, pursuant to 28 U.S.C. §2321(a). Persons who seek to avoid the federal requirements applicable to

continued rail service when acquiring lines, as set forth in Section 10905(f)(4), or who do not agree with the Commission's determination of value or its authorization of abandonment but who do not appeal such determinations, cannot be allowed to proceed under the diverse jurisdictions of the 50 states to countermand the Commission's final orders.

Hayfield Northern bases its litigation on its purported power of eminent domain to acquire C&NW's track and right of way. However, the indisputable and ultimate effect of its litigation is to jeopardize the very benefits to C&NW and to interstate commerce that the Commission acknowledges would flow from the abandonment. This contemplated state condemnation action would require the carrier to relitigate the question of value in a state court when Congress has provided an expedited method (Section 10905) to determine purchase price and where the Commission has already determined the value of the line.

The state court injunction preventing C&NW from removing its track and appurtenances and selling its right of way on the subject line and Hayfield Northern's contemplated condemnation action unmistakably constitute collateral attacks on the Commission's unappealed decisions and orders in this case.

III.

THE LEGISLATIVE HISTORY AND STRUCTURE OF THE STAGGERS RAIL ACT DO NOT SUPPORT APPELLANTS' CONSTRUCTION OF SECTION 10905.

The Appellants argue that the provisions of Section 10905 do not provide the exclusive means for acquiring a rail line and do not displace a state's post-abandonment

condemnation authority (e.g., forced sales via state condemnation). The court of appeals correctly concluded to the contrary, that so called "post-abandonment acquisition" would stand as an obstacle to the accomplishment of Congress' purposes in enacting Section 10905, and was thus preempted. (J.S. App. A5).

The court of appeals recognized that the Staggers Rail Act was in part a congressional response to protracted administrative and legal proceedings which delayed carrier abandonments and delayed carriers' reuse of assets from abandoned lines. (J.S. App. A6-A7). Under Section 10905, any arrangements for continued rail service must be completed within 110 days. The Government argues the sole purpose of Section 10905 is to diminish delay in the issuance of the abandonment certificate. Brief at 18. This attempt to reconcile state condemnation with Section 10905 is overly-simplistic and ignores the purposes and federal interests underlying the enactment of Section 10905. While expedited abandonment decisions were one purpose of the provisions of Section 10905, the restricted time schedule would also expedite the determination of whether a line authorized for abandonment would be acquired or subsidized.[38] If not acquired or subsidized under the Commission's auspices, the carrier could rely on the administrative finality of the Commission's decisions to plan for the productive reuse of its assets elsewhere in its system.

The legislative history of the Staggers Rail Act supports

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[38]See *Railroad Transportation Policy Act of 1979: Hearings on S. 1946 Before the Senate Comm. on Commerce, Science and Transportation*, 96th Cong., 1st Sess. 41 (1979) ("[I]t should be stressed that the intent of this legislation is to simplify and speed up the *subsidy process* and that the Commission not permit the existence of multiple offers to unduly or unfairly delay the process.") (Emphasis added.)

this interpretation. Senator Cochran proposed an amendment to the abandonment provisions in the Senate Committee's bill that ultimately was enacted into law as the Staggers Rail Act. The Cochran amendment sought to eliminate the stringent time limits in the abandonment provisions. Senator Cochran explained that:

> [E]xisting law gives opportunities which are sufficient . . . to these interests to make their case—not only to make their case before the Interstate Commerce Commission, but a sufficient period of time to determine whether or not they want to try to get another rail company or another business entity to obtain the line and equipment that is being abandoned or to explore alternative modes of transportation that may be available . . .
>
> * * *
>
> Under the Committee Bill, however, . . . this period of time during which they may contest, assess the economic impact, explore alternative means of transportation, try to see whether or not the state or local governmental entities can provide assistance is shortened to 9 months.

126 Cong. Rec. 7283 (1980).

In opposition to Senator Cochran's amendment, Senator Cannon stated:

> These procedural reforms will benefit everyone—for neither the communities involved nor the railroads benefit from protracted litigation. . .

Ibid. at 7285.

Following this debate, the Cochran amendment was defeated (*Id.* at 7286). Clearly, the abandonment time schedule of the Staggers Rail Act was not only designed to

reduce the delay in the issuance of Commission abandonment certificates, but was also the result of a balancing of interests to provide adequate time for any arrangements for continued rail service and, at the same time, more quickly free the carriers to be able to reuse their assets more productively." Any alteration of this congressionally prescribed timetable would ruin the balance of interests crafted by Congress in enacting Section 10905.

The Government necessarily suggests that once the abandonment certificate is issued and a carrier ceases service, state condemnation would not interfere with the accomplishment of Congress' purposes in enacting Section 10905. This attempt to reconcile state condemnation with Section 10905 disregards not only the purposes and federal interests involved in the enactment of Section 10905, but also the express purposes and interests underlying the Commission's findings authorizing C&NW's abandonment of the Hayfield segment."

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[27]See *Hearings Before the Senate Subcomm. on Surface Transportation of the Comm. on Commerce, Science and Transportation*, 95th Cong., 2d Sess. 71-72 (1978) ("The ability of the railroads to eliminate, in a more timely fashion, unnecessary branch line operations will facilitate the modernization of the essential parts of the rail plant. When the railroads abandon an unnecessary line, they not only stop the drain on their resources, but also strengthen the remaining parts of their systems by applying the reuseable ties and rail to the needed parts of their plant. This strengthening of the needed rail plant obviously permits safer operations.") (Statement of William H. Dempsey).

[28]See J.L.21 ("[C&NW] is in marginal financial condition . . ."; "[C]ontinued operation of the [Hayfield segment] will impose a burden on [C&NW] and on interstate commerce . . ."; "[C&NW] has shown . . . there is need elsewhere in its system for reuseable track and other materials in the Line or that these assets may be liquidated to provide needed cash to [C&NW]"); J.L.62 ("[T]he ALJ's 120-day public use condition] will be amended to permit the removal of rail and ties"); J.A.33, J.L.80 ("[C&NW] is operating a marginal line and is incurring a substantial opportunity cost and a grant of [a] stay [delaying the effective date of the abandonment certificate] would cause [C&NW] to continue to incur this cost.")

The Commission and the courts have explicitly recognized that burdens on interstate commerce arise not only from losses sustained by carriers operating unprofitable lines, but also from the dedication of rail assets to unprofitable uses which could be used profitably elsewhere. Ex Parte 274 (Sub-No. 3), *Abandonment of Railroad Lines-Use of Opportunity Costs*, 360 I.C.C. 571 (1979). See also *Missouri Pac. R.R. Co. v. United States and Interstate Commerce Commission*, 625 F.2d 178 (8th Cir. 1980); *State of Maine, Dep't of Transp. v. Interstate Commerce Commission, supra; In re Boston and Maine Corp., supra.*

While the issuance of an abandonment certificate may end a carrier's operating losses, the carrier would still be unable to plan for and productively reuse its track materials elsewhere if the carrier was subjected to protracted state condemnation actions. The so-called "post-abandonment acquisition" procedures in this context stand as an obstacle to the accomplishment of Congress' intent to permit carriers to abandon unprofitable lines and reuse productive and profitable rail assets elsewhere.

The Government concedes that "state law would be preempted to the extent that it actually interfered with a certificate of abandonment issued by the Commission" (Brief at 29, n. 23), for example, where the Commission authorized an abandonment on the ground that relocation of the track was essential to enable the carrier to provide adequate interstate service elsewhere. *Id.* Yet the very issue of whether a carrier's under-utilized assets should be allowed to be reused more productively elsewhere is one of the central issues addressed in all abandonment cases, including the abandonment of the subject

line. See Ex Parte 274 (Sub-No. 3), *Abandonment of Railroad Lines-Use of Opportunity Costs*, 360 I.C.C. 571 (1979); J.L.21.

The Shippers Group's substantive appeal of the Commission's abandonment decision in this case involved the issue of whether opportunity costs should be considered by the Commission (J.L. 46). The Commission determined on appeal that indeed opportunity costs were to be considered in determining the burden on interstate commerce imposed by the subject line (J.L. 57-58). When the Shippers Group (Hayfield Northern) petitioned the Commission to stay the effectiveness of the abandonment pending judicial appeal, Commission Chairman Taylor denied the petition, stating "[C&NW] is incurring a substantial opportunity cost and a grant of this stay would cause [C&NW] to continue to incur this cost" (J.A. 33; J.L. 80). The Commission has found "when reusable rail assets are tied up on a line where they are barely used, there is a burden on interstate commerce." *Texas & Pac. Ry. Co. Abandonment*, 363 I.C.C. 666, 676 (1980). Therefore, even though the abandonment certificate was issued for the Hayfield segment, the burden on commerce continued so long as C&NW was forcibly prevented from recovering and reusing its assets.

Appellants continue to recite the argument unsuccessfully advanced before the courts below, namely, that preemption has not occurred as the jurisdiction of the Commission ends with the issuance of an abandonment certificate. Appellants' Brief at 22-23. This argument was fully considered and rejected by the court of appeals. (J.S. App. A10-A11). The issue involved is not one of Commission *jurisdiction*, but whether Minnesota condemnation

authority would frustrate the accomplishment of Congress' *objectives* in enacting Section 10905. *(Ibid.)*. There is simply no question that Congress' intent to protect carriers from "protracted legal proceedings" and to permit carriers to expeditiously abandon unprofitable lines to facilitate the reuse of rail assets elsewhere would be undermined by Appellants' proffered construction of Section 10905.

The court of appeals noted Section 10905 also demonstrates Congress' concern with the orderly operation of rail lines after their transfer under Section 10905(f). (J.S. App. A6-A7). The Appellants completely disregard this provision of Section 10905 and the legislative purpose it represents.

Under the Appellants' abandonment scenario, a party could avoid the two year service commitment under Section 10905(f)(4) by merely waiting until after the abandonment certificate is issued to acquire the rail line for continued rail use by condemnation. Clearly, the availability of such a "post-abandonment acquisition" procedure decimates the effectiveness of Section 10905 in providing for the orderly transfer and operation of rail lines following abandonment authorization.

The Government incorrectly asserts that state condemnation would not circumvent the Commission's determination of value of the Hayfield segment. Brief at 25-26. The Government's brief states that an offeror of financial assistance who invokes the Commission's jurisdiction to establish conditions and compensation, pursuant to Section 10905(f)(1), and who later withdraws the offer, pursuant to Section 10905(f)(2), is thereupon free to resort to state condemnation authority to acquire the rail line. Brief at 18. This untenable interpretation of Section 10905 would serve

only to invite the "protracted legal proceedings" which Section 10905 was clearly designed to avoid. The Government thus endorses the price-shopping method utilized by Hayfield Northern in this case.

This interpretation is also unwarranted by virtue of the structure of Section 10905. Upon the withdrawal of an offer of financial assistance, any other offeror may purchase or subsidize the rail line, but only if such a subsequent offeror accepts the conditions and amount of compensation established by the Commission in connection with the original offer. See 49 U.S.C. §10905(f) (3).

By withdrawing an offer of financial assistance, the original offeror is not liable to compensate the carrier for the amount determined by the Commission; however, the parties continue to be bound by the Commission's valuation unless it is appealed and reversed by the appropriate court of appeals. Ex Parte 274 (Sub-No. 6), *Abandonment of Railroad Lines and Discontinuance of Service*, 365 I.C.C. 249, 261 (1981).

Section 10905(f)(1) provides for the Interstate Commerce Commission to determine the value of a railroad line in connection with abandonments. The Commission's jurisdiction under Section 10905(f) was invoked by the incorporators and principals of Hayfield Northern. The Commission determined, in an unappealed order, that the net liquidation value of the 19.2-mile segment of line was in excess of $1.7 million. (Mot. to Aff. App. A32). Where Congress has given the Commission authority to determine value and where the Commission has in fact determined that value, it is imprudent as a matter of policy to require a carrier to re-litigate the question of value in a state court.

The court of appeals' construction of Section 10905

cannot be read as an affront to a state's ability or effort to preserve rail service." Such a portrayal as proffered by the Appellants and amici curiae endeavor to inappropriately extend the holdings of the decisions of the courts below in an effort to enhance the substantiality of the narrow question presented by this appeal. Moreover, this Court need not address the peculiarities of the individual states' laws which differ substantially from the purported condemnation power of Hayfield Northern to acquire C&NW's track and right of way for continued rail purposes.

In the instant case, the Shippers Group, after having invoked the procedures of Section 10905 to have the Commission determine a "binding" valuation of the subject line, chose to withdraw its offer of financial assistance and to not appeal the Commission's determination of value. Instead, in the form of Hayfield Northern, it obtained from the state court an injunction to prevent C&NW from removing its track and appurtenances and selling its real estate because it allegedly sought to condemn the property at some indefinite time in the future. It never did. The court of appeal's decision cannot be considered a death knell on the states' ability to preserve local rail service for their own public purposes,[30] when the state itself did not invoke Minnesota's eminent domain statute in this case.

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[29]This action involves the attempt of a hastily-formed Minnesota railroad company to exercise condemnation powers granted to railroad corporations by Minn. Stat. §222.27 (1982) to acquire C&NW's intact rail line and right of way. This action does not involve an effort by the State of Minnesota to acquire rail line and right of way for future public use as a part of the state rail bank program (see Minn. Stat. §222.63 (1982)), nor an effort of a political subdivision or local government unit to preserve and improve local rail service (see Minn. Stat. §§398A.01-.09 (1982)).

[30]Appellee does not suggest the states can avoid Section 10905 procedures to acquire intact rail lines following abandonment by resorting to their eminent domain statutes. However, this issue is not one properly before this Court.

Appellants attempt to buttress their argument by relying on non-authoritative opinions of the Commission and the courts. This Court has consistently held that a court is not bound by an agency's misconstruction of a statute, but instead should construe the statute itself. See *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm.*, 390 U.S. 261, 272 (1968) "[T]he courts are the final authorities on issues of statutory construction, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385, and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute.' *NLRB v. Brown*, 380 U.S. 278, 291."

In *Chicago & N.W. Transp. Co.—Abandonment—in Waukesha, Jefferson and Dane Counties, Wisc.*, I.C.C. Docket No. AB-1 (Sub-No. 144) (May 5, 1983), the Commission stated "after all conditions to an abandonment have been complied with and the certificate is effective, federal interest and Commission jurisdiction end." (Emphasis deleted). (Appellants' App. to Joint Supplemental Memorandum, at A5). This dictum conflicts, however, with the prior recognition of the Commission and courts that burdens on interstate commerce arise not only from losses sustained by carriers operating unprofitable lines, but also from the dedication of rail assets to unprofitable uses which could be used profitably elsewhere. See Ex Parte 274 (Sub-No. 3), *Abandonment of Railroad Lines-Use of Opportunity Costs*, 360 I.C.C. 571 (1979)."[31]

[31]The Commission has held that "the judicious consideration of opportunity costs as one of the factors in abandonment cases will enable us to fulfill better our statutory duty to ensure the development, coordination, and preservation of a transportation system that meets the needs of the United States." *Abandonment of Railroad Lines—Use of Opportunity Costs, supra*, 360 I.C.C. at 578. Accord, *Missouri Pac. R.R. Co. v. United States and Interstate Commerce Commission*, 625 F.2d 178 (8th Cir. 1980).

This position also conflicts with prior Commission decisions wherein it acknowledged its status as a quasi-condemnation tribunal as a result of Section 10905. See *Chicago & N.W. Transp. Co.—Abandonment—Between Clintonville and Eland, Wisc.*, AB-1 (Sub-No. 104), 363 I.C.C. 975, 977 (1981).

Appellants also quote the rulemaking proceedings in Ex Parte 274 (Sub-No. 6), *Abandonment of Railroad Lines and Discontinuance of Service*, 365 I.C.C. 249, 260-261 (1981), in an effort to buttress the untenable proposition that preemption has not occurred. Brief at 24. Appellants refer to comments submitted by the Association of American Railroads (hereinafter "AAR") which requested clarification of the Commission's proposed rules regarding abandonments and offers of financial assistance. Brief at 24-25. The Commission declined the AAR's proposal to require a forfeitable bond from states offering to subsidize or purchase lines. The AAR comment is nothing more than an expression of concern; it is certainly not a substantive precedent for Appellants.

Appellants resort to dicta from two courts of appeals decisions in an effort to gain support for the position that preemption has not occurred. In *Chicago & N.W. Transp. Co. v. United States*, 678 F.2d 665, 667 (7th Cir. 1982), Judge Posner suggested that post-abandonment eminent domain may have been possible in pre-Staggers Rail Act actions. The court did not undertake an analysis of whether post-abandonment condemnation was possible after enactment of the Staggers Rail Act, since the issue before the court was the determination and interpretation of fair market value under Section 10905, and not the limitations of condemnation authority. *Id.* at 666.

Similarly, in *Simmons v. Interstate Commerce Commission*, 697 F.2d 326 (D.C. Cir. 1982), the court concluded only that the Commission had authority, under 49 U.S.C. §10505(a), to exempt states from labor protection provisions of the Interstate Commerce Act and to create a modified certificate program to allow states to start up and terminate rail service. 697 F.2d at 328.[32]

Hayfield Northern's action under Minnesota condemnation procedures seeks to avoid the clear federal mandate and the congressionally-determined scheme of continuation of rail service in connection with abandonments of rail lines. The inescapable conclusion is that Minnesota condemnation law,[33] for purposes of condemning an intact rail line and right of way in order to continue rail service on that line, has been preempted by Section 10905 of the Staggers Rail Act.

CONCLUSION

Minnesota state law authorizing Hayfield Northern to condemn C&NW's abandoned railroad track and right of way stands as an obstacle to the full purposes and objec-

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[32]Appellants also cite *Modern Handcraft, Inc.—Abandonment in Jackson County, Mo.*, 363 I.C.C. 969, 972 (1981), as suggesting that state condemnation actions are a proper means to acquire rail property to continue rail service. Appellants thus confuse Section 10905, the *rail continuation* provision, with Section 10906, the *public purpose* provision. The court of appeals correctly noted that *Modern Handcraft* involved solely the possibility of state condemnation of an abandoned rail line for *non-rail public purposes*, not for continued rail service. (J.S. App. A9.) The acquisition of rail property for public purposes is governed by 49 U.S.C. §10906 and does not apply to the acquisition of rail property in order to continue rail service. (J.S. App. A9, citing *Chicago & N.W. Transp. Co.—Abandonment—Between Clintonville and Eland, Wisc.*, 363 I.C.C. 975, 976 (1981)). Whether condemnation for non-rail public purposes would also be preempted by the Staggers Rail Act was not before the court of appeals. (J.S. App. A9.)

[33]Minn. Stat. §222.27 (1982); Minn. Stat. §300.04 (1982).

tives of Congress in enacting 49 U.S.C. §10905, and is thus preempted. Hayfield Northern's use of a state court injunction to prevent C&NW's removal of its assets and the attempt to acquire the subject track and right of way by state condemnation procedures constitute impermissible collateral attacks on the Commission's orders and decisions. Therefore, the judgment of the court of appeals, which affirmed the district court's order granting summary judgment in favor of C&NW and dismissing Hayfield Northern's complaint, should be affirmed.

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IN THE

Supreme Court of the United States

October Term, 1983

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v.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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ARGUMENT

THE CERTIFICATE OF ABANDONMENT MEANS NO MORE THAN THE PUBLIC CONVENIENCE AND NECESSITY PERMIT PERMANENT CESSATION OF THE CNW SERVICE ON THE HAYFIELD SEGMENT.

All parties agree that the Interstate Commerce Commission has issued a certificate of abandonment on the Hayfield segment. The issuance of the certificate reflects the Commission's finding that the local community need for this segment was outweighed by interstate commerce generally and the economic burden to the Chicago and North Western Transportation Company (appellee) in continuing rail service on this segment. There is no warrant to appellee's suggestion that the determination by the Commission to permit the CNW to abandon the Hayfield segment is an affirmative grant of power by the Commission to the CNW to ignore state process. This segment is not insulated from a state condemnation by reason that it had previous status as rail property. Appellee's contention that a state condemnation is a collateral attack on the Commission's order is groundless since the condemnation action does not and could not address the order: it addresses the property itself. Once the certificate of abandonment was effective, the Commission jurisdiction ended, as did federal interest. *Chicago & N.W. Transp. Co.—Abandonment—in Waukesha, Jefferson and Dane Counties, Wisc.*, I.C.C. Docket No. AB-1 (Sub-No. 144) (May 5, 1983) (Set forth in the Appendix to Supplemental Memorandum of Appellant and Appellant/Intervenor).

THE ABANDONMENT BALANCE.

The Commission determines whether to permit an abandonment by balancing "the interest of those now served by the present line on the one hand, and the interest of the carrier and the transportation system on the other." *Chicago & N.W. Trans. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 321, citing *Purcell v. United States*, 315 U.S. 381, 384 (1942). The Commission thus balances the benefits and burdens of abandonment between the community served by the carrier on the line and interests of the carrier and interstate commerce generally. See *Colorado v. United States*, 271 U.S. 153, 168-169 (1926). "In that balancing, the fact of demonstrated prejudice to interstate commerce and the absence of earnings adequate to afford reasonable compensation are, of course, relevant and may often be controlling. But the act does not make the issuance of the certificate dependent upon a specific finding to that effect." *Colorado v. United States*, at 169. Accordingly, avoidable costs and opportunity costs to the carrier in continued operations are proper elements for the Commission to weigh. If, as here, the balance points in favor of the needs of the private carrier over those of the community a certificate of abandonment issues, which permits cessation of service on the line. This certificate evidences that the rail line has lost its status as rail property and is no longer the subject of federal interest or commission jurisdiction. See *Abandonment of Railroad Lines and Discontinuance of Service*, 365 I.C.C. 249, 261 (1981) (". . . the disposition of rail property after an effective certificate of abandonment has been exercised is a matter beyond the scope of the Commission's jurisdiction, and within a State's reserved jurisdiction. Questions of title to, and disposition of, the property are

matters subject to State law.") The effective date of abandonment relieves the carrier of the burden of federal regulation on the line, but does not subordinate state interest in that line to the interests of the former carrier after abandonment, as appellee contends.

Notwithstanding the Commission finding that the public convenience and necessity permit abandonment, 49 U.S.C. §10903, Congress in enacting Section 10905 has provided a method in which service can continue and abandonment avoided. Under previous law, abandonment proceedings were often attended by delay pending negotiations on pre-abandonment transfer. Section 10905 is directed to that delay. Section 10905 provides that a pre-abandonment transfer, whether by subsidy or purchase, can postpone the abandonment process by no more than 110 days. Section 10905 is entirely silent on post-abandonment disposition of real property. In a Section 10905 disposition, service is continued, while a state condemnation only reaches property that has been abandoned and, thus, requires a fresh certificate from the ICC before service can be restored.

ABANDONED RAIL PROPERTY IS NOT A SPECIAL CLASS OF PROPERTY.

Section 10905 is designed to deal solely with pre-abandonment acquisitions. There is nothing in the language of the Act, legislative history, or decisions of the Interstate Commerce Commission or the courts to suggest that this is a special class of property that a state cannot condemn directly or by delegation.

Appellee contends that this property is insulated from a state condemnation that seeks to rededicate this property to

rail use. The avoidable costs, including opportunity costs, mentioned by the appellee supporting this contention are but elements looked to by the Commission in its determination to permit abandonment. The finding by the Commission that the CNW suffered opportunity costs on this segment is not an affirmative finding of entitlement to this lost opportunity, as contended by appellee. Brief at 31, 37. Opportunity costs are looked to by the Commission only as an aid in carrying out the mandate of balancing the interest of the carrier and the interest of the local community to determine whether abandonment is to be permitted. It is not an affirmative determination that the railroad is entitled to avoid opportunity costs under any circumstance.

There is no merit to appellee's contention that a condemnation action will unduly burden CNW. CNW is entitled to the same benefits and burdens on this property as any other Minnesota property owner. If the property sought to be condemned is unique or if a condemnation action would somehow disadvantage the CNW, the CNW can seek relief to protect it from any untoward result.

CONCLUSION

Accordingly, for the reasons stated in our main brief and in this brief, the judgment below must be reversed and the case remanded to the district court to fashion an appropriate remedy.

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Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF ARKANSAS DELAWARE, IDAHO, IOWA, KANSAS, LOUISIANA, MICHIGAN, NEW JERSEY, NORTH DAKOTA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, VERMONT, WASHINGTON, WISCONSIN AND WYOMING, IN SUPPORT OF APPELLANT AND APPELLANT/INTERVENOR

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INTEREST OF THE AMICI CURIAE

The amici states have two distinct but overlapping interests.

First, as sovereign states they have an interest in preserving the right of eminent domain as an essential attribute of their sovereignty.

Second, several states have committed resources to the restoration of rail service on lines abandoned under the authority of the federal government. See Matter of Chicago, M., St. P. & Pac. R. Co., 658 F.2d 1149, 1167-68 nn. 33-40 (7th Cir. 1981), cert. denied, 102 S. Ct. 1632 (1982) (dealing with programs active in South Dakota, Washington, and Wisconsin). Iowa acquires property by eminent domain for use as a railway, IOWA CODE sec. 471.6 (1983), and specifically does so for the "preservation of abandoned railroad right of way for

future railroad use." IOWA CODE sec. 471.9 (1983). Wisconsin acquires abandoned rail property by eminent domain for "future transportational, recreational or scenic purposes." Sec. 85.09(2), Wis. Stats. (1981-82). Minnesota empowers foreign and domestic rail corporations to acquire by eminent domain property necessary for rail purposes. Sec. 222.27, Minn. Stats. (1982). The Court of Appeals' decision presents a serious setback to these programs. It forecloses all states from acquiring abandoned rail property by eminent domain. Thus, an essential tool for providing necessary services is frustrated.

ARGUMENT

Congress Did Not Preempt Post-Abandonment State Eminent Domain

A. The presumption is against preemption

On its face, ousting states of their eminent domain sovereignty is a matter of the highest importance in federal-state relations.

The Solicitor General describes this case as "involv[ing] delicate questions of federalism." (Jur. St. Ap. 30.) The ICC General Counsel describes it as involving a "significant Tenth Amendment issue because [the holding below] interferes with the State's choice of purposes for which it authorizes use of an integral governmental function -- the power of eminent domain." (Id. at 59.)

This Court assumes that the historic powers of the states are not superseded by federal legislation, absent clear and

manifest contrary purpose of Congress. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). The power of eminent domain is such an historic power. It is "traditionally associated with sovereignty." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974). The power is "inalienable" and an "essential attribute of sovereignty ... . Without it, the state cannot be a state." Nichols, The Law of Eminent Domain, sec. 1.141[3] (3d ed. 1981).

The Court of Appeals' decision, read narrowly, would permit condemnation of abandoned rail property for recreational or scenic purposes, or to build a highway. But the foreclosure of eminent domain to preserve intrastate rail service is an unprincipled distinction that invades the prerogatives of a sovereign state to choose. As will be

seen, it frustrates federal interests as well.

The holding creates a void in the Republic, whether read narrowly or broadly. The federal government has authorized abandonment of rail service in a small part of Minnesota at the behest of a private entrepreneur who cannot make a financial go of it. The Eighth Circuit now concludes that states are impotent to meet the local rail need in futuro because of federal abandonment. Local rail preservation programs are devastated by this ruling, because abandonment creates the local need for restoration.

Accordingly, it must be presumed that Congress did not intend to divest the states of this historic attribute of their sovereignty, eminent domain, to fulfill public purposes.

B. The federal and state programs are in harmony

The Court of Appeals made three errors in analysis: (1) it neglected to attempt to harmonize state and federal law; (2) it failed to appreciate that Congress encourages local programs like Minnesota's to revive rail service in the wake of the hemorrhaging abandonments throughout the interstate rail corridors; and (3) it saw state-federal conflicts where none exist because it did not discern the complementary nature of the two programs.

One can agree with the court, at least arguendo, that a state rail preservation program must not stand as an obstacle to the federal program. But one still can insist on the court's duty to attempt to find harmony between the two programs. See Merrill Lynch, Pierce,

Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973).

The laws are in harmony. Congress has fostered state restoration of local service to replace federally abandoned rail lines. The "collapse of several major carriers necessitated a substantial federal effort to ensure continuation of vital service." Simmons v. I.C.C., 697 F.2d 326, 328 (D.C. Cir. 1982). This effort included "encouraging states to become involved in the preservation of local rail service." Id. Through subsidies and other means, the "congressional policy ... plac[es] the states at the forefront of the federal effort to preserve local rail service." Id. at 329. Because of state involvement after abandonment, the ICC acknowledged "it lacked jurisdiction to regulate state acquisition of an abandoned rail line,

since by the process of abandonment the line lost its status as rail property." Id. at 331.

Although federal jurisdiction is lacking as to state acquisition of an abandoned line, Commission jurisdiction awakens once operation of the line resumes. Id. But states were exempted from many of the ICC start-up rules in order to "remove obstacles that might prevent state acquisition of abandoned rail lines." Id. at 332.

Thus, federal policy is served only by encouraging state acquisitions of abandoned rail property. The lower court's failure to understand this was its basic flaw.

Title 49 U.S.C. sec. 10905 concerns the process of abandonment, not subsequent acquisition. It only "postpone[s]" the abandonment date on

receipt of an offer of financial assistance. It is a tool to avoid abandonment, not a solution after abandonment. Whatever state powers may be preempted prior to abandonment, the ICC holds that once the "rail line has been fully abandoned, it is no longer rail line and the transfer of the line is not subject to our jurisdiction." Common Carrier Status of States, 363 I.C.C. 132, 135 (1980). The Court of Appeals, however, felt there was a federal interest apart from ICC jurisdiction, 693 F.2d at 824, to which the ICC subsequently responded, with specific reference to the decision under review, that "federal interest and Commission jurisdiction end" once abandonment is complete. Chicago and North Western Transp. Co. -- Abandonment in Waukesha, Jefferson, and Dane Counties, Wisconsin,

Docket No. AB-1 (Sub-No. 144 (May 5, 1983)) (emphasis added). Accord, Chicago and North Western Transp. Co. v. U.S., 678 F.2d 665, 667 (7th Cir. 1982) (the eminent domain power could await "till the line was abandoned").

The Eighth Circuit did not appreciate the cooperative federalism erected by Congress: the ICC controls the abandonment process; the states are encouraged to then take over to revive local rail service.

Lacking this perception of the overall federal scheme, the Court of Appeals saw conflicts where none exist.

The court saw a conflict from delay caused by eminent domain proceedings. But post-abandonment condemnation does not delay the abandonment. Congress shortened the ICC abandonment process from six months to about 110 days for two

reasons. One purpose was to protect carriers from efforts to "tediously extend the abandonment process." H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 125 (1980). This quote refers to the previous six months at the ICC, not a subsequent state condemnation. Accord, Chicago & North Western Transp. Co. v. U.S., 582 F.2d 1043, 1049 (7th Cir.) cert. denied, 439 U.S. 1039 (1978) (Congress determined "to grant relief from the prolonged administrative proceedings that had attended abandonment and discontinuance."). State condemnation, of course, does not extend abandonment proceedings; it operates ony after their completion.

Congress' second purpose in abbreviating the six months was to protect states from carrier gouging. The six-month period "enabled a railroad to

hold out for a price that would reflect at least some of the value of continued rail service." Chicago and North Western Transp. Co. v. U.S., 678 F.2d 665, 667 (7th Cir. 1982). Congress did not want this power in railroads, and "[t]hat is why it amended section 10905 in 1980 to allow -- indeed require -- the Commission to fix the price of the sale if the parties could not agree." Id., at 668. The purpose of protecting states is not frustrated by allowing condemnation.

The court also saw a conflict in using condemnation as a price setting mechanism after invocation of the price setting mechanism in sec. 10905. First, however, this "conflict" at best would foreclose the 10905 offeror from using state condemnation, perhaps on a waiver theory. It hardly warrants the court's sweeping conclusion that the mere

existence of sec. 10905 jettisons any post-abandonment condemnation, regardless of whether 10905 had been invoked or whether the condemnor and 10905 offeror were one and the same. Second, sec. 10905 expressly empowers the offeror to walk away from the ICC price; only the carrier is bound. 49 U.S.C. sec. 10905(f)(2). Since Congress expressly refrained from binding the offeror, the court should not do so even on a waiver theory, much less under the guise of a preemption analysis. Third, the purpose in binding the carrier was not to save it from condemnation or to terminate acquisition efforts, but was to exact a quid pro quo for the accelerated process. As accelerated, the carrier can reduce the losses on an unprofitable line, but it is bound by the price. See Chicago, 678 F.2d at 671. While the

offeror can yet choose condemnation, it must suffer the lost service in the interim. Fourth, different valuation factors arise in a condemnation that may make the price lower or higher. See Opinion of ICC General Counsel. (Jur. St. Ap. 46, esp. n. 3).

Finally, the court saw a conflict from state law because of the detailed procedure in 10905. However, as the ICC Office of Proceedings noted, 10905 sets forth "an extensive statutory plan for such sales before abandonment becomes effective, but there is nothing in the statute to suggest a federal interest in the property once abandonment is consummated." (Jur. St. Ap. 55.) (Emphasis in original.)

C. The decision frustrates federal interests

By foreclosing state eminent domain acquisitions of abandoned rail property, the Eighth Circuit frustrates the congressional policy to place the states at the forefront of restoring service in this depression-plagued industry.

The ICC General Counsel has noted the federal funding programs designed to instigate state activity. (Jur. St. Ap. 15.) Also see Simmons, 697 F.2d at 328-29. The Eighth Circuit decision stymies use of the funds. Further, the decision has "foreclosed one important means by which states may help to continue rail service." ICC General Counsel. (Jur. St. Ap. 59.)

D. The decision has absurd consequences

Since abandoned railroads often lie fallow for months or years, the Eighth Circuit decision means the states could not condemn even after that dormancy. Moreover, since preemption is a jurisdictional matter, a state could not condemn even if the carrier agreed such procedure was the best price-setting mechanism. Indeed, even with a dozen intervening private owners, 10905 so runs with the land, under the ruling even beyond the twenty-first century, that the state could not condemn for rail purposes -- ever.

Further, if abandonment under 10905 preempts state law afterwards, how can the railroad sell the property if not pursuant to state law? If the federal interest continues, how can it be sold even if state recording laws, etc.,

otherwise apply? What federal interest survives? Is it assumed only eminent domain is preempted? If so, is it because a state judicial system cannot be trusted to ascertain just compensation? It is the ICC, however, and not state courts, that lacks valuation experience.

E. Only parochial interests are served by the decision

This decision serves no federal regulatory interest, as witnessed by the federal government's position here. It jeopardizes state prerogatives, as witnessed by the active involvement of the states. It serves no interest of the Association of American Railroads. (Jur. St. Ap. 11.)

This decision serves only the parochial interests of a single carrier that apparently wishes to remove the

track, thereby obstructing the state and federal interest to restore service.

SUMMARY OF ARGUMENT

The decision below declares that Congress has preempted the state power of eminent domain. Eminent domain, however, is an essential attribute of state sovereignty which can be preempted, if at all, only under the clearest of conflict with federal law.

No such conflict appears here. In fact, the programs are in harmony. The federal interest lies in controlling the conditions under which a rail carrier may abandon service. Once that service is abandoned, no federal regulatory interest in the rail line survives. It is federal policy, however, to encourage states to fill the void by developing programs to restore local rail service.

The decision below denies the use of eminent domain to pursue the federal policy of restoring local rail service through state programs. In so doing, the court has both frustrated federal policy and invaded an essential attribute of state sovereignty.

CONCLUSION

It is respectfully submitted that this Court should reverse.

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v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether the Interstate Commerce Act, 49 U.S.C. (Supp. V) 10905, preempts state law authorizing the condemnation of an abandoned railroad line for the purpose of providing rail service.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1579

HAYFIELD NORTHERN RAILROAD COMPANY, INC., AND MINNESOTA, APPELLANTS

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF THE UNITED STATES

On May 16, 1983, the Court invited the Solicitor General to express the views of the United States in this case. In response we filed a brief urging the Court to note probable jurisdiction; we hereby submit the views of the United States at the merits stage.

As noted in our previous submission, the United States' view is that the Interstate Commerce Act does not preempt state law authorizing abandoned railroad lines to be taken by eminent domain; nor would the exercise of state power in this case interfere with or materially affect the programmatic interests of the Interstate Commerce Commission or any other department or agency of the United States. The United States' interest in this case is, therefore, that federal law not be misconstrued and overenforced so as to result in an unwarranted pre-

emption of state authority. The United States has a substantial interest in the maintenance of a proper relationship between the national and state governments and the preservation of state authority where no federal interest requires the displacement of state law.

STATEMENT

The Interstate Commerce Act requires that the abandonment of railroad lines be approved by the Interstate Commerce Commission (ICC). See 49 U.S.C. (Supp. V) 10903.[1] The Act also provides an alternative to abandonment: if, during the abandonment process, a financially responsible person (including a government authority) makes an offer of financial assistance to purchase the rail line or subsidize its operations, the rail carrier must—in lieu of abandonment—sell the line or continue to provide rail service under the subsidy. See 49 U.S.C. 10905. The question presented in this case is whether this financial assistance provision—Section 10905—preempts a Minnesota law authorizing the condemnation, for subsequent railroad use, of a rail line *after* it has been duly abandoned with the approval of the ICC.

Resolution of this issue depends upon a proper understanding of the Interstate Commerce Act; we therefore begin with a brief discussion of the history and structure of the Act.

A. The Statutory Background

1. The Interstate Commerce Act was passed in 1887 (see Act of Feb. 4, 1887, ch. 104, 24 Stat. 379); it was the first great federal regulatory statute adopted under the Commerce Clause. See G. Gunther, *Constitutional Law* 134 (9th ed. 1975).[2] The 1887 Act did not include provisions subjecting railroad abandonments to the approval of the ICC.

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[1] We will hereinafter omit "Supp. V" in references to the current version of the Act.

[2] For the background of the 1887 Act, see, *e.g.*, I. Sharfman, *The Interstate Commerce Commission* (Pt. 1), 11 *et seq.* (1931); C. Miller, *ICC Law and Procedure* 43 *et seq.* (1939).

The Commission's authority over abandonments was established in the Transportation Act of 1920, ch. 91, 41 Stat. 456, 49 U.S.C. (1925 ed.) 1(18)-(22). See *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 319-320 (1981). The 1920 Act "introduced into the federal legislation a new railroad policy." *New England Divisions Case*, 261 U.S. 184, 189 (1923). Previously, "the effort of Congress had been directed mainly to the prevention of abuses * * *. The 1920 Act sought to ensure, also, adequate transportation service" (*ibid.*). The 1920 Act was designed "affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country" (*Dayton-G.C. Ry.* v. *United States*, 263 U.S. 456, 478 (1924)) and "to provide the public with an efficient and nationally integrated railroad system" (*ICC* v. *Railway Labor Executives Ass'n*, 315 U.S. 373, 376 (1942)). See also, *e.g.*, *Wisconsin R.R. Comm'n* v. *Chicago, B. & Q. R.R.*, 257 U.S. 563, 585 (1922); *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 81 (1944).

Among the principal concerns giving rise to the 1920 Act was the conflict between federal and state regulation of railroads. Prior to the Act,

> regulations coincidentally made by federal and state authorities were frequently conflicting, and often the enforcement of state measures interfered with, burdened and destroyed interstate commerce. Multiple control in respect of matters affecting such transportation has been found detrimental to the public interest as well as to the carriers. Dominant federal action was imperatively called for.

Transit Comm'n v. *United States*, 289 U.S. 121, 127 (1933). See also *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. at 320. ICC abandonment authority represents an integral part of this statutory scheme and seeks to ensure that "interstate commerce [is protected] from undue burdens" that might be imposed by state requirements concerning the continuation or elimination of service. *Colorado* v. *United States*, 271

U.S. 153, 162 (1926). See also *id.* at 163, 166, 168; *New England Divisions Case*, 261 U.S. at 190 & n.8; *Railroad Comm'n* v. *Eastern Tex. R.R.*, 264 U.S. 79, 83-84 (1924).

The abandonment provisions of the 1920 Act remained substantially unchanged until 1976. In the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub. L. No. 94-210, § 802, 90 Stat. 127, 146, originally codified at 49 U.S.C. (1976 ed.) 1a, Congress revised the abandonment provisions to impose a specified schedule to govern the abandonment process. In addition, the 4-R Act allowed abandonment to be delayed for six months if a financially responsible person offered to subsidize or purchase a rail line authorized for abandonment. However, the 4-R Act did not require the railroad in such a case to sell the line or provide service under a subsidy. See 49 U.S.C. (1976 ed.) 1a(6).[3]

2. The Interstate Commerce Act was further amended by the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1942. In its current form, the Act provides that a rail carrier subject to ICC jurisdiction may abandon its lines or discontinue its operations "only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance." 49 U.S.C. 10903(a). The Act requires that the carrier file with the ICC an "application for a certificate of abandonment or discontinuance * * * and a notice of intent to abandon or discontinue * * *." 49 U.S.C. 10904. The Act also sets strict time limits for the ICC to render a decision on abandonment applications. *Ibid.*

The provision at issue in this case—Section 10905—provides that the Commission shall publish in the Federal Register its findings "that the public convenience and necessity require or permit abandonment or discontinuance of a particular railroad line" and that "[w]ithin

[3] The 1976 provisions were subsequently recodified, without substantive change, as 49 U.S.C. (Supp. II) 10903 *et seq.* See Pub. L. No. 95-473, 92 Stat. 1405; *Chicago & N.W. Transp. Co.* v. *United States*, 582 F.2d 1043, 1048 (7th Cir.), cert. denied, 439 U.S. 1039 (1978).

10 days following the publication, any person may offer to pay the carrier a subsidy or offer to purchase the line." 49 U.S.C. 10905(c). If the ICC finds within 15 days that the offeror is "a financially responsible person (including a government authority)" and that the offer of assistance meets prescribed standards, it "shall postpone the issuance of a certificate authorizing abandonment or discontinuance * * *." 49 U.S.C. 10905(d).

In the event the offeror and the carrier "fail to agree on the amount or terms of the subsidy or purchase, either party may, within 30 days after the offer is made, request that the Commission establish the conditions and amount of compensation." 49 U.S.C. 10905(e). Upon such request, the ICC is "to establish the conditions and amount of compensation * * * within 60 days," and this "decision * * * shall be binding on both parties, except that the person who has offered to subsidize or purchase the line may withdraw his offer within 10 days of the Commission's decision." 49 U.S.C. 10905(f)(1)(A) and (2). If the offer is withdrawn, "the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance * * *" (*ibid.*).

Under the provisions of Section 10905, the maximum time that may elapse from the ICC's publication of proposed abandonment to the conclusion of the process for subsidy or purchase is 110 days.

B. Proceedings In This Case

1. The relevant facts in this case are undisputed and are set forth in the opinion of the court of appeals (J.S. App. A2-A3). In July 1981, the Commission issued an initial decision pursuant to 49 U.S.C. 10903 that the public convenience and necessity require or permit the abandonment of a 44-mile branch line owned and operated by appellee Chicago and North Western Transportation Company (CNW) in Iowa and Minnesota. Pursuant to Section 10905, a group of shippers on the line submitted an offer of financial assistance to subsidize the operation of a 19.2-mile segment of the line in Minnesota (the Hayfield segment). The group also filed an administrative

appeal from the initial decision insofar as it permitted abandonment of the Hayfield segment.

The Commission found that the shippers' group was a "financially responsible person" within the meaning of Section 10905(d) and, as required by that Section, delayed the issuance of the certificate of abandonment that would have allowed CNW to cease operating the line. Because of the inability of the shippers' group and CNW to agree on a subsidy, the shippers' group asked the Commission, pursuant to Section 10905(e), to establish the conditions and level of subsidy. The Commission determined the subsidy level and, as part of that calculation, also determined the net liquidation value of the Hayfield segment to be $1,791,354. The shippers' group thereafter withdrew its subsidy offer as permitted under Section 10905(f)(2). J.S. App. A2.

In October 1981, the Commission affirmed its initial decision allowing the abandonment of the entire line, including the Hayfield segment.[4] The Commission issued an abandonment certificate in November 1981. All of the foregoing actions occurred in timely compliance with the requirements of Section 10905. J.S. App. A2.

2. On December 17, 1981, CNW ceased operating the line. Thereafter, CNW made arrangements to salvage and utilize the track from this line in a project in Iowa (J.S. App. A3).

On March 31, 1982, members of the shippers' group formed appellant Hayfield Northern Railroad Company, Inc. (Hayfield Northern), a Minnesota public service corporation that has power under Minnesota law to condemn rail lines for railroad purposes. Hayfield Northern immediately filed suit in state court, alleging that it desired to condemn the right of way, track, and appurte-

[4] The shippers' group petitioned for judicial review in *Brownsdale Cooperative Ass'n* v. *United States*, No. 81-2333 (8th Cir. filed Dec. 3, 1981), and sought a stay pending review of the Commission's final decision. After the court denied the request for a stay, the shippers moved to dismiss their petition. The court granted this voluntary dismissal on January 14, 1982.

nances of the Hayfield segment. It also sought a temporary restraining order to prevent CNW from dismantling the line. The state court granted the restraining order. J.S. App. A3.

CNW removed the suit to the United States District Court for the District of Minnesota and moved to dismiss on the ground that Section 10905 preempts state law authorizing condemnation of an abandoned rail line for railroad purposes. The State of Minnesota intervened on the side of Hayfield Northern in order to defend the applicability and validity of its statute. J.S. App. A3.

The district court granted summary judgment in favor of CNW because "federal law has preempted the state law as it applies to procedures seeking continued rail service in connection with an abandonment" (J.S. App. A15). The court dismissed the complaint with prejudice and dissolved the restraining order (*id.* at A16).

3. The United States Court of Appeals for the Eighth Circuit granted a stay to Hayfield Northern upon the posting of a bond. After argument on the merits, the court of appeals dissolved the stay, affirmed the judgment of the district court, and remanded to that court "for a determination of the amount of damages due CNW on account of delay" (J.S. App. A12).

The court of appeals held that Section 10905 preempts the Minnesota statute because "the state law authorizing Hayfield Northern to condemn CNW's abandoned railroad line for continuing rail purposes 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" (J.S. App. 5, quoting *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982)).[5] First, the court concluded that

[5] The court of appeals confined its holding to state condemnation "for continued rail service" and did not decide "whether condemnation for non-rail public purposes would also be pre-empted by federal law" (J.S. App. A9). Compare *Chicago & N. W. Transp. Co.—Abandonment—Between Clintonville and Eland, Wisc.*, 363 I.C.C. 975 (1981) (ICC authority under Section 10905 to set the conditions and amount of financial assistance does not extend to offers for non-rail use).

Section 10905 "makes provision for continued rail service an integral part of the federal abandonment process" (J.S. App. A6). The court also concluded that "[t]he elaborate procedural detail of this scheme indicates that * * * the Commission [has] exclusive and plenary authority to provide for continuation of rail service in connection with abandonments" (*id.* at A7). In particular, the court found that state condemnation actions might involve " 'protracted legal proceedings' " that would frustrate "the benefits of the 110 day time schedule" under Section 10905 (J.S. App. A7), and "would circumvent the Commission's determination of value" and deviate from the "expedited method by which [the] sale price may be determined [under Section 10905]" (J.S. App. A8). Finally, the court rejected appellants' argument that the Commission and the federal courts had recognized that the Interstate Commerce Act does not preempt state authority to condemn rail lines (*id.* at A8-A11).

Following the denial of rehearing by the court of appeals (J.S. App. A16-A17), this Court denied appellants' motion to stay the issuance of the court of appeals' mandate (*id.* at A26-A27). On October 3, 1983, the Court noted probable jurisdiction in this case.

SUMMARY OF ARGUMENT

The Interstate Commerce Act does not preempt traditional state power to condemn property that was formerly used as a rail line and that has been abandoned pursuant to a certificate of abandonment issued by the ICC. The Commission's abandonment authority ends at the point that the certificate of abandonment takes effect. Likewise, the Commission's authority with respect to offers of financial assistance under Section 10905 (49 U.S.C. 10905) is limited to pre-abandonment offers and is designed to provide continued and uninterrupted service by means of purchase or subsidy prior to abandonment. The Commission's authority over abandonments, including its authority to facilitate continuing rail service under pre-abandonment offers of financial assistance,

does not establish federal control over post-abandonment transfers of property previously used to provide rail service and therefore does not preempt state authority to condemn an abandoned line, even if the state's purpose is eventually to commence new service under a fresh ICC certificate of public convenience and necessity.

The provisions of Section 10905 are not designed to create an exclusive method for assuring future rail service over a rail line that the ICC has authorized to be abandoned. Nothing in the language of the statute or its legislative history calls for such exclusivity or suggests a congressional intent to preempt state power to condemn abandoned lines. Section 10905 simply provides a mechanism to assist those who seek uninterrupted service; the possibility of pre-abandonment acquisition under federal law does not operate to the exclusion of all possibilities of post-abandonment acquisition under state law. Nor do the time limits and valuation procedures in Section 10905 suggest that the statute was meant to be exclusive. These provisions merely regulate the acquisition of lines before abandonment occurs and were designed to eliminate delay in the Commission's abandonment process in order to reduce the burden on carriers who must maintain service until the ICC has approved the abandonment. This statutory scheme is not impaired by a state's condemnation of a line for which the ICC has already issued an abandonment certificate relieving the carrier of its obligation to continue rail service.

The Commission itself has determined that its abandonment authority, including its authority under Section 10905, does not extend beyond the point at which the certificate of abandonment becomes effective, and thus it has recognized that a state's authority to effect a post-abandonment condemnation is not preempted. The Commission's reasonable interpretation of the Interstate Commerce Act is entitled to judicial deference and supports the conclusion that the Act does not preempt state power to condemn a rail line that has been abandoned with ICC approval.

ARGUMENT

THE INTERSTATE COMMERCE ACT DOES NOT PREEMPT A STATE'S AUTHORITY TO CONDEMN A RAIL LINE THAT HAS BEEN ABANDONED WITH THE APPROVAL OF THE ICC

The court of appeals erred in holding that the Interstate Commerce Act preempts state authority to condemn a railroad line after that line has been abandoned with the approval of the ICC. The court's decision fails to recognize that the Commission's authority over abandonments, including its authority pursuant to Section 10905, does not extend beyond the point at which the certificate of abandonment becomes effective. Thus, a state's post-abandonment condemnation of a rail line—whether for purposes of reinstituting rail service or otherwise [6]—does not intrude upon the Commission's exclusive abandonment authority.

The court of appeals' central mistake was its conclusion that the scheme created by Section 10905, authorizing a pre-abandonment "take-over" under ICC supervision in order to assure uninterrupted rail service in certain cases, was intended to provide the sole and exclusive method for providing *future* rail service over such lines, and thus prohibits the initiation of steps under state law, after abandonment, to restore rail service to those lines. Properly viewed, Section 10905 simply provides a method for assuring that, in the face of what would otherwise be abandonment, rail service continue. (It is, of course, a special and advantageous method because it avoids abandonment and assures uninterrupted continuity of service without the need for new certification by the ICC.) But this method was never designed to displace other traditional ways for states to initiate steps designed to bring about the creation of new rail service. One such method,

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[6] Of course, a new operator must obtain a certificate from the Commission before recommencing rail service. See 49 U.S.C. 10901; 49 C.F.R. 1150.1 *et seq.*; *Common Carrier Status of States*, 363 I.C.C. 132, 138 (1980), aff'd *sub nom. Simmons* v. *ICC*, 697 F.2d 326 (D.C. Cir. 1982); J.S. App. A49.

wholly conventional, is to bring eminent domain proceedings; eventually this will lead to a request to the ICC for a certificate of public convenience and necessity for new rail service. No federal interest is harmed or affected by the invocation of state condemnation law against property formerly used for rail service but now duly abandoned pursuant to ICC authorization, even though the purpose of the condemnation is, ultimately, to restore rail service on that line. The federal interest in that case is precisely the same as it would be with respect to property owned by CNW (or others) that had never previously been used for rail service: to assure that any new rail service is properly certificated by the Commission.

Consequently, since no federal statutory or programmatic interest is adversely affected by the exercise of the state's condemnation power in this case, and since no such interest is furthered by the preemption of that power (see J.S. App. A59), we agree with appellant that the Interstate Commerce Act does not preempt state authority to condemn an abandoned railroad line, even if the purpose of the condemnation is to restore rail service on that line.[7]

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[7] The court of appeals did not suggest, and appellants' jurisdictional statement does not argue, that Congress in the exercise of its power under the Commerce Clause could not preempt the condemnation of abandoned railroad lines. Cf. *Block* v. *North Dakota*, No. 81-2337 (May 2, 1983), slip op. 17 n.26; *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941); *Transit Commission* v. *United States*, 284 U.S. 360, 368 (1932); *Colorado* v. *United States*, 271 U.S. 153, 165-166 (1926). As a matter of constitutional principle, such a statute would be no different from the established federal preemption of state condemnation of rail lines prior to abandonment. See, *e.g.*, *In re New York, N.H. & H.R.R.*, 447 F.2d 428, 429-430 (2d Cir. 1971); *Massachusetts* v. *Bartlett*, 266 F. Supp. 390, 392-393 (D. Mass.), aff'd in relevant part, 384 F.2d 819, 820 (1st Cir. 1967), cert. denied, 390 U.S. 1003 (1968); *New Orleans Terminal Co.* v. *Spencer*, 366 F.2d 160 (5th Cir. 1966), cert. denied, 386 U.S. 942 (1967); *City of Des Moines* v. *Chicago & N.W. Ry.*, 264 F.2d 454 (8th Cir. 1959); *Kansas City Area Transp. Authority* v. *Ashley*, 555 S.W.2d 9 (Mo. S. Ct.), cert. denied, 434 U.S. 1066 (1977); cf. *Board of Hudson River Regulating Dist.* v. *Fonda, J. & G.R. Co.*, 249 N.Y. 445, 164 N.E. 541 (1928); but

The Court has recently noted that "[t]he goal of any preemption inquiry is 'to determine the congressional plan.'" *Rice* v. *Rehner*, No. 82-401 (July 1, 1983), slip op. 4-5, quoting *Pennsylvania* v. *Nelson*, 350 U.S. 497, 504 (1956). In making that inquiry, "'we start with the assumption that the historic police powers of the States were not to be superseded by Federal Acts unless that was the clear and manifest purpose of Congress.'" *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977), quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). "This assumption provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts" (430 U.S. at 525; citation omitted).

Accordingly, it is well settled that "'an unexpressed purpose to nullify * * * [state power] is not lightly to be attributed to Congress.'" *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 103-104 (1980), quoting *Parker* v. *Brown*, 317 U.S. 341, 351 (1943). "Pre-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.'" *Chicago & N. W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981), quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963). And, where possible, "the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117, 127 (1973), quoting *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963).[8]

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cf. *Chicago, R.I. & G. Ry.* v. *Tarrant County Water Control & Improvements Dist.*, 76 S.W.2d 147 (Tex. Ct. Civ. App. 1934), cert. denied, 295 U.S. 762 (1935). See also J.S. App. A45 n.2. Thus, the only question in this case is whether, as a matter of statutory construction, the Interstate Commerce Act preempts a state's post-abandonment condemnation.

[8] These principles are especially apt in a case involving a state's condemnation authority, which is "part of its sovereign power"

It is in light of these principles that we now show that the Commission's abandonment authority should not be taken to preempt the states' authority to condemn abandoned rail lines.

A. ICC Authority Over Abandonments Does Not Preempt A State's Authority To Condemn A Rail Line After It Has Been Abandoned

Nothing in the abandonment authority of the ICC justifies the court of appeals' conclusion that the acquisition of an already-abandoned rail line for the purpose of restoring service is "an integral part of the federal abandonment process" (J.S. App. A6) or that the Commission has "exclusive and plenary authority" over such matters "in connection with abandonments" (*id.* at A7). On the contrary, the Commission's abandonment authority simply ceases when the abandonment has taken effect.

It is, of course, common ground that a railroad line cannot be abandoned without the approval of the ICC. See 49 U.S.C. 10903(a); *Thompson* v. *Texas M. Ry.*, 328 U.S. 134, 144-145 (1946); *Smith* v. *Hoboken R.R.*, 328 U.S. 123, 130 (1946); see also *California* v. *Southland Royalty Co.*, 436 U.S. 519, 529 n.6 (1978). Thus, a carrier's "operation must continue until a certificate permitting abandonment is issued by the Interstate Commerce Commission." *Warren* v. *Palmer*, 310 U.S. 132, 138 (1940). It also is settled that the Commission has "exclusive" and "plenary" authority over abandonments. See *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. at 320, 321.

ICC abandonment authority terminates, however, when the abandonment has taken effect. As discussed above (see page 3, *supra*), the purpose of the Interstate Commerce Act, including the abandonment provisions, is "to maintain an adequate railway service for the people

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(*United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 277 (1943)) and "an attribute of sovereignty * * * [that] inheres in every independent State * * * [and is] necessary for the proper performance of governmental functions" (*Georgia* v. *City of Chattanooga*, 264 U.S. 472, 480 (1924)).

of the United States" (*Wisconsin R.R. Comm'n* v. *Chicago, B. & Q. R.R.*, 257 U.S. 563, 585 (1922)) and to ensure that "interstate service may be adequately rendered" (*Colorado* v. *United States*, 271 U.S. 153, 166 (1926)). In order for the Commission to approve an abandonment—which involves a cessation " 'permanently or indefinitely [of] all transportation service on the relevant line' " (*Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. at 314 n.2; citation omitted)—it must find that the "present or future public convenience and necessity require or permit" that the line be abandoned. 49 U.S.C. 10903(a)(2). Thus, in issuing an abandonment certificate, the Commission has "adjudged that public necessity and convenience d[o] not demand the continuance of [those] interstate services." *Colorado* v. *United States*, 271 U.S. at 170. And once it has been determined that the line may be withdrawn from the interstate rail system, the Commission's regulatory authority is at an end. See J.S. App. A59. Accordingly, a state's condemnation of an abandoned line does not involve the "conflicting * * * [m]ultiple control" (*Transit Comm'n* v. *United States*, 289 U.S. at 127) by federal and state authorities that the Interstate Commerce Act was designed to prevent, and is not preempted by the Commission's power over abandonments.

Section 10905 accords with this statutory abandonment scheme. Section 10905 is intended, as its title indicates, "to avoid abandonment[s]." By its terms, Section 10905 involves offers of financial assistance that are submitted prior to abandonment (see 49 U.S.C. 10905(c)-(e)) in order to "provide continued rail service" (49 U.S.C. 10905(e) and (f)). It "creates a method for transferring the rail properties prior to their downgrading [through abandonment]." H.R. Rep. 96-1035, 96th Cong., 2d Sess. 43 (1980). As the Commission has recognized, Section 10905

> envisions * * * uninterrupted service * * *. Offers of financial assistance are meant to avoid abandonment and discontinuance.
>
> * * * * *

> [U]nder 49 U.S.C. 10905 we can require a sale, which will *provide continued rail service.*

Abandonment of Railroad Lines and Discontinuance of Service, 365 I.C.C. 249, 260, 261 (1981) (emphasis in original).

Once a rail line has been abandoned, Section 10905 becomes inapplicable. At that point, the issue is not—as the court of appeals believed—the "continuation of rail service" (J.S. App. A7) but rather the commencement of new service requiring a fresh certificate of public convenience and necessity from the Commission (see page 10 note 6, *supra*). Accordingly, the Commission's authority over abandonments, including its authority to facilitate continuing rail service pursuant to pre-abandonment offers of purchase or subsidy, does not call for federal control over post-abandonment transfers of property formerly used for railroad purposes.

The court of appeals' decision creates—apparently in perpetuity—a no-man's land in which abandoned rail lines may not be regulated by the ICC or condemned by the state.[9] To create a special class of property thus exempt from normal processes of government regulation is unwise and unwarranted. Rather, federal and state authority in this area should be reconciled by holding that the Interstate Commerce Act grants exclusive authority to the ICC over pre-abandonment transfers to preserve continued and uninterrupted railroad operations, but does not prevent the states from condemning rail lines on which service has been abandoned pursuant to ICC approval.

The court of appeals' decision in this case is a far cry from what appellee characterizes as a "logical extension" (Mot. to Aff. 19) of *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, *supra*. In *Kalo Brick*, the Court held that the ICC's exclusive authority to regulate abandon-

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[9] The court of appeals' opinion furnishes no guidance on such questions as the length of time following abandonment that state condemnation is preempted or whether and in what situations a change of circumstances would enable the state to exercise its condemnation power.

ment preempts a state court judgment for damages based on the discontinuance of rail service. The Court in *Kalo Brick* found that the state award of damages "impose[d] sanctions upon a regulated carrier for doing that which only the Commission * * * has the power to declare unlawful or unreasonable" (450 U.S. at 324) and rested on "precisely the sorts of concerns that Congress intended the Commission to address in weighing abandonment requests from the carriers subject to its regulation" (*id.* at 326-327; footnote omitted). For these reasons, the Court rejected the attempt

> in essence * * * to use state law to compel [the carrier] to furnish cars in spite of the congressional decision to leave regulation of car service to the Commission. * * * It would vitiate the overarching congressional intent of creating "an efficient and nationally integrated railroad system" * * * to permit the State * * * to do exactly what the Commission is empowered to excuse. A system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act.

450 U.S. at 325-326 (citation omitted). In contrast to *Kalo Brick*, nothing in the Commission's authority over abandonments—including its authority over pre-abandonment offers of financial assistance for continued rail service—is inconsistent with a state's post-abandonment condemnation of a rail line.

B. The Provisions Of Section 10905 Do Not Provide The Exclusive Means For Acquiring A Rail Line And Do Not Displace A State's Post-Abandonment Condemnation Authority

The court of appeals was led to its preemption holding by its conclusion (J.S. App. A7-A8) that the provisions for purchase or subsidy in Section 10905 were designed to provide the exclusive means for acquiring a rail line that the ICC has authorized to be abandoned. The court

inferred such exclusivity from the time limits and valuation procedures specified in Section 10905.

1. At the outset, we note that Section 10905 and its legislative history are entirely silent on the question of preemption of a state's post-abandonment condemnation of a rail line. The Court has noted in a similar context that "[i]f this old and familiar power of the states was withdrawn * * *, we ought to find language fitting for so drastic a change." *Palmer* v. *Massachusetts*, 308 U.S. 79, 85 (1939). Thus, the direct answer to the court of appeals' holding of exclusivity is "that the statute contains no such provision nor any language suggesting it." *Central N. E. Ry.* v. *Boston & A. Ry.*, 279 U.S. 415, 419 (1929).

In fact, there is particular reason here to expect that Congress would have spoken affirmatively if it had intended to preempt the states' post-abandonment condemnation authority. Section 10905 specifically contemplates that an offer of financial assistance can be made by "a government authority" (49 U.S.C. 10905(d)(1)); Congress's attention was thus drawn to the question of the activities of states in connection with abandonments. In these circumstances, Congress's silence on a matter as fundamental as condemnation "'strongly suggests that [it] did not intend'" to displace state authority (*United States* v. *Bass*, 404 U.S. 336, 350 (1971), quoting *Rewis* v. *United States*, 401 U.S. 808, 812 (1971)) or "significantly change[] the federal-state balance" (404 U.S. at 349; footnote omitted).

2. Not only does the statute contain no direct expression of exclusivity, it likewise suggests no basis for the court of appeals' conclusion that it was intended by implication to furnish the exclusive method for acquiring a rail line that the ICC has approved for abandonment. Section 10905 simply provides a mechanism to assist those who seek to continue existing service; it allows them to take steps to acquire the line prior to abandonment and thus assure uninterrupted service. But there is no indication that Congress intended the possibility of pre-abandonment acquisition (under federal law) to displace

all possibilities of post-abandonment acquisition (under state law).

Indeed, Section 10905 explicitly allows an offeror to "withdraw his offer within 10 days of the Commission's decision [on the conditions and amount of compensation]" (49 U.S.C. 10905(f)(2)). By this provision, Congress presumably intended that the situation would return to the status quo ante and that the offeror would be able to invoke whatever preexisting rights it might have—including, in the case of a state, the right of condemnation.

Moreover, the time limits and valuation procedures contained in Section 10905, upon which the court of appeals relied in finding exclusivity, were merely designed to regulate the acquisition of lines prior to abandonment. As we now proceed to show, the purposes of these provisions would not be impaired by state condemnation of a rail line that has been abandoned, and therefore they do not imply that pre-abandonment offers of financial assistance are to operate to the exclusion of post-abandonment acquisitions.

a. *Time Limits.* In enacting the abandonment provisions of the Staggers Act of 1980 (see pages 4-5, *supra*)—which include the provision for offers of financial assistance (see Pub. L. No. 96-448, § 402, 94 Stat. 1942)—Congress sought to reduce the delays involved in the abandonment process. Because rail service cannot be terminated until the ICC issues a certificate of abandonment, delays in authorizing abandonment impose a burden on the carrier seeking to cease operations on the line.

In the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub. L. No. 94-210, § 802, 90 Stat. 127, 146, 49 U.S.C. (1976 ed.) 1a, Congress first established a specified schedule for the issuance of abandonment certificates. See page 4, *supra*. These provisions

> put[] strict time limits on * * * abandonments * * *. In this way, * * * many of the regulatory problems that have caused delay within the Commis-

sion, and imposed financial burdens upon the nation's railroads, are being eliminated.

H.R. Rep. 94-725, 94th Cong., 1st Sess. 54 (1975). See also S. Rep. 94-499, 94th Cong., 1st Sess. 3, 44 (1975); *Chicago & N.W. Transp. Co.* v. *United States*, 582 F.2d 1043, 1045-1046, 1049 (7th Cir.), cert. denied, 439 U.S. 1039 (1978). Despite the 4-R Act, however, there continued to be lengthy delays in the abandonment process.[10]

The Staggers Act responded to this problem by prescribing stricter time limits for processing abandonment applications. See 49 U.S.C. 10904(b) and (c). These provisions apply in all cases and impose "severe time constraints" (*Abandonment of Railroad Lines and Discontinuance of Service*, 365 I.C.C. 249, 250, 253 (1981)) requiring the Commission to reach a final abandonment decision within 255 days or less.

Congress also specifically addressed the timing provisions for offers of financial assistance under Section 10905. Because an offer of purchase or subsidy postpones the Commission's issuance of a certificate of abandonment (see 49 U.S.C. 10905(d)), Section 10905 can contribute to the delays in abandonment that were of concern to Congress. Accordingly, Congress decreased the period for resolving such offers from six months under the 4-R Act (49 U.S.C. (1976 ed.) 1a(6)(a)) to 110 days (49 U.S.C. 10905(c)-(f); see pages 4-5, *supra*).[11]

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[10] See 125 Cong. Rec. 6440 (1979); 126 Cong. Rec. 7285 (1980); *Railroad Transportation Policy Act of 1979: Hearings on S. 1946 Before the Senate Comm. on Commerce, Science, and Transportation*, 96th Cong., 1st Sess. 46 (1979) (hereinafter cited as *Senate Hearings on S. 1946*); *Railroad Deregulation Act of 1979: Hearings on H.R. 4570 Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 93, 1034 (1979) (hereinafter cited as *House Hearings*); *Railroad Deregulation Act of 1979: Hearings on S. 796 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science, and Transportation*, 96th Cong., 1st Sess. 70-71, 210, 925, 938 (1979) (hereinafter cited as *Senate Hearings on S.796*).

[11] In addition, the 4-R Act only permitted but did not require the carrier to sell a line or provide service pursuant to an offer of finan-

The legislative history of the Staggers Act makes clear that these statutory time limits were intended to eliminate delays in the abandonment process in order to reduce the burden on carriers who are required by federal law to continue operations until a certificate of abandonment is issued. Contrary to the conclusion of the court of appeals, nothing in this purpose supports the preemption of state authority to condemn once the ICC has authorized the abandonment and the carrier has been relieved of its federal obligation to furnish rail service.

In introducing the predecessor bill (S.796, 96th Cong., 1st Sess. (1979)) to the Staggers Act, Senator Cannon included in the Congressional Record a Department of Transportation analysis that explained the background of the abandonment provisions:

> The existing abandonment procedures provide no compensation to railroads for the losses incurred in operating their lines while the abandonment process is taking place. This noncompensated loss occurs even after the Commission finds that a certificate should be granted but is still awaiting subsidy from a "financially responsible person." * * *
>
> The amendment contained in this section retains the basic requirement that the Commission find that the public convenience and necessity * * * permit or require an abandonment * * *, but * * * more definite time limits are provided. A provision is also included to allow service to continue on a line if it is subsidized or purchased, but strict limits are placed on the time a railroad can be forced to continue losing operations while a subsidy or purchase agreement is being negotiated.

125 Cong. Rec. 6440-6441 (1979). Thereafter, following revision of S.796 with respect to other sections, Senator Cannon introduced a successor bill that was eventually

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cial assistance. The Staggers Act amended this statutory scheme by binding the carrier to offers that meet prescribed criteria. See H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 125 (1980); S. Rep. 96-470, 96th Cong., 1st Sess. 40 (1979); 125 Cong. Rec. 29967 (1979); *id.* at 6441; *Chicago & N.W. Transp. Co.* v. *United States*, 678 F.2d 665, 667-668 (7th Cir. 1982).

enacted into law (S. 1946, 96th Cong., 1st Sess. (1979)), and he again included a section-by-section analysis that noted that one of the "major objectives" of the abandonment provisions is to "significantly reduc[e] the time spent processing such cases at the Commission * * *." 125 Cong. Rec. 29967 (1979).

The congressional hearings on the Act also reveal that the purpose behind the abandonment provisions was to facilitate the expeditious elimination of unneeded and unprofitable rail service by reducing delay in the issuance of ICC abandonment certificates. For example, Secretary of Transportation Goldschmidt noted that "[o]ne of the significant costs borne by the railroads is ICC-dictated continuation of service on branch lines that have little or no traffic, when normal business economics would clearly dictate abandonment of service. Present ICC procedures are designed to preserve the common carrier obligation, but they are far too slow." *Senate Hearings on S.1946*, at 91. ICC Chairman O'Neal submitted an agency analysis that stated that "[n]umerous parties have expressed concern that the Commission's abandonment procedures and standards unduly delay the ability of the railroads to withdraw from losing facilities and services." *House Hearings* 167.[12] And the Association of American Railroads, after noting the significant losses entailed by delay in abandonment proceedings (*Senate Hearings on S.796*, at 938), expressed its understanding that the abandonment provisions would

> establish definite time limits within which applications would have to be processed—approximately five to eight months depending upon whether an offer to subsidize continuation of service is made.
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> * * * * *

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[12] See also *Senate Hearings on S. 1946*, at 131 (statement of ICC Chairman O'Neal) ("[T]he bill significantly shortens the time limits within which the Commission will have to make abandonment decisions. * * * The Commission is certainly aware of the need to expedite abandonment proceedings").

> S. 796, while improving existing law by setting deadlines, would still require a railroad to litigate itself out of a line and would require the carrier to continue to bear the losses pending a final decision.
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> * * * * *
>
> The abandonment process, which can be interminable, has always placed squarely on the railroad's shoulders the losses that continue pending final disposition.

Id. at 939, 947.[13]

In sum, the abandonment provisions of the Staggers Act were designed to eliminate delay in the ICC's abandonment process so that carriers would be able promptly to cease unprofitable service. The House Report on the Act explained:

> An enormous amount of time, effort, and expense has been expended contesting abandonments. Few challenges have been successful. * * *
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> * * * * *
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> [It is necessary to] avoid expensive protracted litigation * * * [and to] provide[] the carrier desiring to abandon a line a vehicle for prompt abandonment.

H.R. Rep. 96-1035, 96th Cong., 2d Sess. 43 (1980).

To rectify this problem, Section 402 of the Staggers Act—which contained the provisions of 49 U.S.C. 10905 as well as those of 49 U.S.C. 10903 and 10904—"expedites abandonment proceedings by specifically setting forth time periods within which the Commission must act upon abandonment applications * * * * *. The provisions in [this section] assist shippers who are sincerely inter-

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[13] The Association of American Railroads also "urge[d] that once a carrier has decided to abandon a service, but is required to continue to operate it pending public decisions as to subsidy or purchase, the public should pay all costs incurred pending its decision." *Senate Hearings on S.796*, at 946. This proposal was not considered by Congress or incorporated in the bill.

ested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process." H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 125 (1980). See also *id.* at 85 ("[n]ew time limits are established for considering abandonment applications"); S. Rep. 96-470, 96th Cong., 1st Sess. 39 (1979) ("[t]he abandonment provisions of this bill are designed to accomplish two major objectives: significantly reducing the time spent processing such cases at the Commission and improving the process by which abandoned lines can be subsidized"); *id.* at 2, 38, 40-41.

The congressional debates clearly reflect the understanding that the Act was intended to reduce the delay in issuing abandonment certificates to permit carriers to cease service. Senator Cannon noted in presenting the Conference Report that "[t]he abandonment provisions * * * should eliminate much of the cost, delay, and uncertainty involved in abandonment proceedings." 126 Cong. Rec. S14002 (daily ed. Sept. 30, 1980). In explaining the abandonment provisions in the Senate Committee's bill that ultimately were enacted into law, Senator Cannon adverted to the "more stringent deadlines for abandonments." 126 Cong. Rec. 7260 (1980). Senator Kassebaum, referring to the difficulties under existing law "of carriers [seeking] to abandon lines that are no longer contributing to the going concern of the railroad" (*id.* at 7261), stated that

> [a]mong the key measures included in this bill is [a] section * * * which streamlines the present abandonment structure. * * * It enables rail carriers to be able to cut away from their system those lines that are not contributing to the going concern value of the carrier. * * * [This section] cuts the time limit for the decision on railroad abandonment.

Id. at 7263. And in supporting the bill, Senator Glenn pointed to the provisions "that expedite the onerous, often expensive, time-consuming bureaucratic delays that have created a moribund air around rail transportation * * *

[including] the time consumed in abandonment proceedings * * *. The bill's provisions encouraging and allowing those proceedings to be expedited are excellent" (*id.* at 7293).[14]

This legislative record makes clear that the time limits in Section 10905—part of the abandonment provisions of the Staggers Act—are directed to delays that occur during the abandonment process.[15] Because a carrier must maintain service until a certificate of abandonment is issued, such delays impose a burden on the carrier to continue operations that it is seeking to terminate as unprofitable and unnecessary. Section 10905 addresses this problem by limiting the postponement of an abandonment certificate, pending an offer of financial assistance, to a maximum of 110 days.

State condemnation of already abandoned rail lines does not conflict with this congressional purpose. Once the process under Section 10905 has been completed with-

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[14] In addition, Senator Cochran proposed an amendment to the bill to eliminate the stringent time limits in the abandonment provisions. Senator Cochran explained that the bill "would significantly shorten the process under which abandonment proceedings are now carried out * * * [and would] set a much more compressed time frame under which abandonment applications will be considered by the Interstate Commerce Commission." 126 Cong. Rec. 7282 (1980). Senator Cannon opposed the amendment because of the need to "reduc[e] the time spent processing such cases at the Commission * * *. The Cochran amendment would eliminate these procedural reforms and abandonment cases would continue to be as long and expensive as they now are" (*id.* at 7285). Senator Kassebaum also opposed the Cochran amendment on the ground that it would have "[s]tretch[ed] out the time to make a case against an abandonment * * *" (*ibid.*). As Senator Kassebaum emphasized:

> [M]aking a railroad line operate that desires to abandon * * * is going to * * * add a financial drain to the railroad * * *.
>
> * * * * *
>
> Maintaining the status quo of stretching abandonment proceedings before the ICC * * * must not be perpetuated.

Ibid. Following this debate, the Cochran amendment was defeated (*id.* at 7286).

[15] See also J.S. App. A33 (comments of the Association of American Railroads).

out a purchase or subsidy, the carrier is granted a certificate of abandonment and is free to cease rail service. State condemnation of a rail line that has been abandoned cannot, by definition, delay the issuance of the abandonment certificate that relieves the carrier of its obligation under federal law to continue rail operations.

b. *Valuation Procedures.* The court of appeals was also incorrect in concluding (J.S. App. A8) that state condemnation of the Hayfield segment "would circumvent the Commission's determination of value" or deviate from the "expedited method by which [the] sale price may be determined" under Section 10905.[16] No issue exists here of "circumvention" or the disregard of a statutorily prescribed procedure for valuation. Again, the fundamental point is that the ICC's valuation process is designed to deal solely with pre-abandonment acquisitions. There is certainly nothing in the language or structure of the statute that suggests that the pre-abandonment valuation process was intended to constitute the definitive determination of value for all time and for all purposes and thus that it should, by implication, preclude conventional post-abandonment transactions such as eminent domain.

In fact, Section 10905(f)(1)(A) allows the ICC only 60 days to determine the value of a line, and such a brief period requires the Commission to utilize "summary procedures" (*Chicago & N.W. Transp. Co.* v. *United States*, 678 F.2d 665, 671 (7th Cir. 1982)).[17] This "expedited

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[16] The court of appeals (J.S. App. A8) did not principally rely upon the fact that a subsidy offer under Section 10905 had actually been made in this case; rather, it found preemption based on the existence of Section 10905 and presumably would apply its holding where the statutory procedure in fact had not been invoked. Nor did the court of appeals distinguish between cases involving a *subsidy* offer and those in which a *purchase* offer is made.

[17] Contrary to appellee's suggestion (Response to Brief for the United States as Amicus Curiae 6 n.6), this discussion does not in any way cast doubt on the constitutional adequacy of the Commission's valuation procedures under Section 10905. See *Chicago & N.W. Transp. Co.* v. *United States*, 678 F.2d at 671.

method" (J.S. App. A8) is necessary in order to prevent delay and to facilitate continued and uninterrupted service on a line that would otherwise be abandoned. Nothing in Section 10905 suggests, however, that the ICC's abbreviated valuation procedures should be taken to establish the value of a line in all contexts or to preclude a state court from setting a different value based on record evidence at the time of condemnation.[18] And there is certainly no warrant for reading into the provision authorizing the ICC to make summary pre-abandonment valuations a broad implied substantive command to displace normal state power to condemn railroad properties after the federal regulatory scheme has fully run its course and the properties have been duly abandoned.

C. The Interstate Commerce Commission Has Concluded That Its Abandonment Authority Does Not Extend Past The Point Of Abandonment And Therefore Has Recognized That Section 10905 Does Not Preempt A State's Post-Abandonment Authority To Condemn A Rail Line

In matters of statutory construction, "[i]t is settled that courts should give great weight to any reasonable construction of a regulatory statute by the agency charged with the enforcement of that statute." *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971). The courts are "to be guided by the 'venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong * * *.'" *E.I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). And "[p]articularly is this respect due when"—as in this case concerning statutory provisions only recently enacted—"the administrative practice at stake 'involves a contemporaneous construction of a

[18] It is unnecessary to consider in this case whether a state condemnation court would apply the same valuation principles as the ICC (cf. *Chicago & N.W. Transp. Co.* v. *United States*, 678 F.2d at 668) or what weight if any would be given to the ICC's determination of value.

statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.'" *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (citation omitted). These principles of statutory interpretation are fully applicable to the Interstate Commerce Commission. See, *e.g.*, *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 648 n.26 (1978).

Here, the Commission has recognized that its abandonment authority under the Act does not extend beyond the point at which the certificate of abandonment becomes effective. Because it does not have the power to regulate the transfer of a rail line after an abandonment certificate has taken effect, the Commission has concluded that a state's post-abandonment authority to condemn is not preempted.[19]

In *Abandonment of Railroad Lines and Discontinuance of Service*, 365 I.C.C. 249, 261 (1981), the Commission observed that "the disposition of rail property after an effective certificate of abandonment has been exercised is a matter beyond the scope of the Commission's jurisdiction, and within the State's reserved jurisdiction. Questions of title to, and disposition of, the property are matters subject to State law." See also *Common Carrier Status of States*, 363 I.C.C. 132, 135 (1980), aff'd *sub nom. Simmons* v. *ICC*, 697 F.2d 326 (D.C. Cir. 1982) ("when a rail line has been fully abandoned, it is no longer a rail line and the transfer of the line is not subject to our jurisdiction"); *Modern Handcraft, Inc.—Abandonment in Jackson County, Mo.*, 363 I.C.C. 969, 972 (1981).[20]

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[19] In addition, one court has assumed that states may condemn abandoned railroad lines. See *Chicago & N.W. Transp. Co.* v. *United States*, 678 F.2d 665, 669 (7th Cir. 1982).

[20] The Association of American Railroads also has recognized that a state may exercise its post-abandonment condemnation power notwithstanding the existence and invocation of the procedure under Section 10905. See 365 I.C.C. at 260; J.S. App. A38. In addition, AAR has pointed out at least one instance in which a state withdrew its offer of financial assistance under the 4-R Act and subsequently condemned the abandoned line pursuant to state law (*ibid.*).

The Commission has adhered to this position after the decision of the court of appeals in this case. See *Chicago & N.W. Transp. Co.—Abandonment—in Waukesha, Jefferson and Dane Counties, Wisc.*, ICC Docket No. AB-1 (Sub-No. 144) (May 5, 1983) ("after all conditions to an abandonment have been complied with and the certificate is effective, federal interest and Commission jurisdiction end") (emphasis omitted);[21] see also *Atchison, T. & S. F. Ry.—Abandonment—in Los Angeles County, Cal.*, ICC Docket No. AB-52 (Sub-No. 18) (Feb. 25, 1983) at 6, aff'd (Apr. 1, 1983), appeal pending *sub nom. City of Hermosa Beach* v. *ICC*, No. 83-7420 (9th Cir. filed June 10, 1983) (subsequent to the certificate of abandonment, the carrier is "fully subject to State and local laws and regulations * * * to the same extent as any other property owner").[22] Indeed, in deciding not to participate in the present case in the lower courts, the ICC concluded that "once a rail line has been abandoned, Section 10905 can no longer be viewed as preempting a state law condemnation" (J.S. App. A45; footnote omitted).

The Commission's views fortify the conclusion suggested by the language, structure, and history of the Act and by the policies that animate it: once a proper certificate of abandonment has been issued, federal regulatory authority has run its course and the former rail line reverts to its status as ordinary private property fully subject to the power of the state. Federal regula-

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[21] This decision is reprinted in the appendix to appellants' joint supplemental memorandum (A5).

[22] While appearing to recognize that deference is due the interpretation of the Commission, the court of appeals sought (J.S. App. A8-A11) to distinguish this line of authorities. Although the court of appeals was surely correct that none of these statements is four-square with the precise issue presented here, we believe that it took too narrow a view of the position and analysis expressed by the Commission. For this reason, the court of appeals' attempted distinction of these Commission pronouncements is unpersuasive and does not rebut the Commission's determination that it lacks authority—let alone exclusive and preemptive authority—over post-abandonment acquisitions of rail lines.

tion will again come into play only when, after condemnation, a certificate of convenience and necessity for new rail service is sought from the ICC.[23]

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[23] Of course state law would be preempted to the extent that it actually interfered with a certificate of abandonment issued by the Commission. For example, if the ICC authorized a valid abandonment on the ground that relocation of the track was essential to enable the carrier to provide adequate interstate service elsewhere, an order by a state court (or, for that matter, a federal court) barring such transfer would be improper. Cf. *In re Boston & Maine Corp.*, 596 F.2d 2, 5-7 (1st Cir. 1979); *In re Penn Central Transp. Co.*, 366 F. Supp. 62, 63 (E.D. Pa. 1973); *Texas & Pac. Ry. Abandonment*, 363 I.C.C. 666, 678-679 (1980). In general, however, neither a state's post-abandonment condemnation action, nor preliminary relief incidental to that action, would conflict with an authorized abandonment. See J.S. App. A47; see also *id.* at A55, A60.

Appellee contends (Response to Brief for the United States as Amicus Curiae 3-5 & n.4, 7 n.7) that the Commission's abandonment certificate in this case precluded the temporary restraining order entered by the state court to enjoin appellee's removal of track. We disagree. Initially, it should be noted that the court of appeals' preemption holding did not rest on the entry of the restraining order. Beyond that, there is no inconsistency between the TRO and the abandonment certificate. Appellee relies (*id.* at 4 n.4) on the finding by the Administrative Law Judge that appellee "has shown * * * that there is need elsewhere in its system for reusable track and other materials in the Line or that these assets may be liquidated to provide needed cash" (decision of July 10, 1981, at 21). Read in context, however, this finding simply reflects the so-called "opportunity cost" that continued service would impose. See *Abandonment of Railroad Lines—Use of Opportunity Costs*, 360 I.C.C. 571, 571 (1979), aff'd *sub nom. Farmland Industries, Inc.* v. *United States*, 642 F.2d 208 (7th Cir. 1981). Balancing "[t]his burden" against the competing considerations weighing in favor of continued service (decision of July 10, 1981, at 21), the ALJ concluded, and the Commission affirmed, that the obligations of federal law did not require the carrier to continue to commit its resources to providing service on the line. Nothing in this determination indicates, however, that appellee's post-abandonment removal of track could not be enjoined for independent reasons resting on state law. A state may have a number of grounds—such as tax liens or environmental restrictions—for seeking to block the removal of track. Cf. *City of Alexandria* v. *Chicago, R. I. & Pac. R.R.*, 311 F.2d 7 (5th Cir. 1962), rehearing denied, 321 F.2d 822 (5th Cir.), cert. denied, 375 U.S. 922 (1963). Finally, we note that appellee may

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

PAUL M. BATOR
Deputy Solicitor General

MARK I. LEVY
Assistant to the Solicitor General

NOVEMBER 1983

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have an action for consequential damages under Minnesota law (see J.S. App. A7) or be entitled on remand to recover against the appeal bond for "damages * * * on account of delay" (*id.* at A11); the United States takes no position on those issues.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 425990 149

No. 82-1579

IN THE

Supreme Court of the United States

October Term, 1982

HAYFIELD NORTHERN RAILROAD COMPANY, INC.,

Appellant,

and

STATE OF MINNESOTA,

Appellant/Intervenor,

vs.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Appellee.

On Appeal From the United States Court of Appeals for the Eighth Circuit

RESPONSE OF APPELLEE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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IN THE

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Appellant/Intervenor.

vs.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Appellee.

On Appeal From the United States
Court of Appeals for the Eighth Circuit

RESPONSE OF APPELLEE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT

This brief of Appellee Chicago and North Western Transportation Company is submitted to supplement the matter contained in Appellee's Motion to Affirm, and will specifically respond to matters raised in the Brief for the United

States as Amicus Curiae (hereinafter "Solicitor General's Brief").

ARGUMENT

The Solicitor General's Brief fails to establish that the District Court and Court of Appeals incorrectly concluded that, on the facts presented, 49 U.S.C. §10905 (Supp. IV 1980) preempts Minnesota condemnation law when a Minnesota railroad company attempts to condemn a properly abandoned rail line in order to continue rail service on that line.

1. The Court of Appeals concluded that the elaborate procedural detail of Section 10905 indicates that not only has Congress granted the Interstate Commerce Commission (hereinafter the "Commission") exclusive and plenary authority to regulate abandonments, *Chicago and North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 320 (1981), Congress has also granted the Commission exclusive and plenary authority to provide for continuation of rail service in connection with abandonments (J. S. App. A-7).

The Solicitor General argues that offers of financial assistance under Section 10905 are not designed to operate to the exclusion of "post-abandonment acquisition" procedures (e.g., forced sales via state condemnation).[1] The Solicitor General asserts the sole purpose of Section 10905

[1]The Solicitor General admits the Commission has exclusive and plenary authority over abandonments and states this authority extends to pre-abandonment offers of financial assistance under Section 10905 (Solicitor General's Brief at 9-10). Inexplicably, however, the Solicitor General supports the use of so-called "post-abandonment acquisition" procedures which would effectively usurp the Commission's authority pursuant to, and undermine the purposes of, Section 10905.

is to diminish delay in the issuance of the abandonment certificate that relieves the carrier of its obligation under federal law to continue rail operation. Under this construction, once the abandonment certificate is issued and carrier service ceases, state condemnation would not interfere with the accomplishment of Congress' purposes in enacting Section 10905. This attempt to reconcile state condemnation with Section 10905 is overly-simplistic, and ignores the purposes and federal interests underlying the enactment of Section 10905 (*see* Motion to Affirm at 7-12).

The Commission and the courts have explicitly recognized that burdens on interstate commerce arise not only from losses sustained by carriers operating unprofitable lines, but also from the dedication of rail assets to unprofitable uses which could be used profitably elsewhere. *Ex Parte 274 (Sub-No. 3)—Abandonment of Railroad Lines, Use of Opportunity Costs*, 360 I.C.C. 571 (1979). *See also, Missouri Pac. R.R. Co. v. United States and Interstate Commerce Commission*, No. 79-1259 (8th Cir. March 17, 1980); *State of Maine, Dep't. of Transportation v. Interstate Commerce Commission*, 587 F.2d 541 (1st Cir. 1978); *In re Boston and Maine Corp.*, 596 F.2d 2 (1st Cir. 1979).

The Solicitor General's failure to acknowledge these "Opportunity Costs" cases, and the very important federal interests they represent, evinces a superficial understanding of the abandonment process and the federal interests involved.[2] While the issuance of an abandonment certificate

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[2]The Solicitor General incorrectly states: "Typically, a carrier that abandons a rail line simply leaves in place the track and other permanent physical facilities that had been used in providing service" (Solicitor General's Brief at 14, n. 13). This remark is absolutely unsupported by the record and by everyday experience. Contrary to the Solicitor

may end a carrier's operating losses, the carrier would still be unable to profitably and productively reuse its track materials elsewhere if the carrier is subjected to protracted state condemnation actions. In the instant case, Appellant's purported state condemnation action has subjected Appellee to the precise "protracted legal proceedings"[3] which the procedures set forth in Section 10905 were clearly designed to avoid (J.S. App. A-7).[4] The so-called "post-abandonment acquisition" procedures in this context stand as an obstacle to the accomplishment of Congress'

General's assertion, the reuse of rail and track material from abandoned lines on profitable lines elsewhere is the rule, not the exception. This remark underscores the Solicitor General's lack of understanding of the abandonment process, and perhaps explains the Solicitor General's simplistic view of Section 10905 and the federal interests affected by Section 10905.

[3]By enacting Section 10905, Congress intended to "assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to extend the abandonment process." H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 125, *reprinted in* [1980] U.S. Code Cong. & Ad. News 3978, 4110, 4157 (J.S. App. A-6).

[4]Appellant has not yet filed its condemnation action, for reasons understood by neither Appellee nor the Court of Appeals (J.S. App. A-7).

In granting this abandonment, the Commission made a specific finding that there was a need elsewhere in Appellee's system for reusable track and other materials. See Chicago and North Western Transp. Co. — Abandonment Between Oelwein, Ia. and Randolph, Mn., I.C.C. Docket No. AB-1 (Sub-No. 113F) (Decision dated July 10, 1981, served July 15, 1981). This litigation continuously restrained Appellee's removal of the subject track and appurtenances from March 31, 1982 to February 9, 1983. The rail from the 19.2-mile segment of line, which Appellee had planned to utilize to fulfill its contracts with the State of Iowa and certain Iowa shippers to upgrade major grain hauling lines in Iowa, remained intact for one year beyond the time of its anticipated removal in April, 1982, thus disrupting the rail upgrading program and frustrating the effectuation of the Commission's decision.

intent to permit carriers to abandon unprofitable lines and reuse otherwise productive and profitable rail assets elsewhere, and are preempted by Section 10905.

2. The Solicitor General continues to recite the argument unsuccessfully advanced by Appellant before the courts below, namely, that preemption has not occurred as the jurisdiction of the Commission ends with the issuance of an abandonment certificate (Solicitor General's Brief at 9). This argument was fully considered and rejected by the Court of Appeals (J.S. App. A-10 to A-11). The issue involved is not one of Commission "jurisdiction", but whether Minnesota condemnation authority would frustrate the accomplishment of Congress' objectives in enacting Section 10905 (J.S. App. A-10 to A-11). There is simply no question that Congress' intent to protect carriers from "protracted legal proceedings" and to permit carriers to expeditiously abandon unprofitable lines to facilitate the reuse of rail assets elsewhere would be undermined by Appellant's and the Solicitor General's proffered construction of Section 10905.

3. The Court of Appeals noted Section 10905 also demonstrates Congress' concern with the orderly operation of rail lines after their transfer under Section 10905(f) (J.S. App. A-6 to A-7). The Solicitor General completely disregards this provision of Section 10905 and the legislative purpose it represents.

Under the Solicitor General's abandonment scenario, a party could avoid the two year service commitment under Section 10905(f)(4) by merely waiting until after the abandonment certificate is issued to acquire by condemnation the rail line for continued rail use. Clearly, the availability of such a "post-abandonment acquisition" procedure deci-

mates the effectiveness of Section 10905 in providing for the orderly transfer and operation of rail lines following abandonment.

4. The Solicitor General incorrectly asserts that state condemnation would not circumvent the Commission's determination of value of the 19.2-mile segment of railroad line (Solicitor General's Brief at 14-15). The Solicitor General's Brief (at 10) states that an offeror of financial assistance who invokes the Commission's jurisdiction to establish conditions and compensation pursuant to Section 10905(f)(1) and who later withdraws the offer pursuant to Section 10905(f)(2) is thereupon free to resort to state condemnation authority to acquire the rail line.[5] The Solicitor General thus endorses the price-shopping utilized by Appellant in this case. This untenable interpretation of Section 10905 would serve only to invite the "protracted legal proceedings" which Section 10905 was clearly designed to avoid.

Section 10905(f)(1)(A) provides for the Interstate Commerce Commission to determine the value of a railroad line in connection with abandonments.[6] The Commission's

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[5]The Solicitor General incorrectly suggests that upon an offeror's withdrawal of an offer of financial assistance, Congress "intended that the situation would return to the status quo ante" (Solicitor General's Brief at 10). This assertion is simply unwarranted. Upon the withdrawal of an offer of financial assistance, any other offeror may purchase or subsidize the rail line, but only if such an offeror accepts the conditions and amount of compensation established by the Commission in connection with the original offer. See 49 C.F.R. §1152.27(m)(3) (1982).

[6]The Solicitor General's attempt to discredit the Commission's valuation procedures is unfounded (Solicitor General's Brief at 15). Section 10905(f) valuation procedures were held constitutionally adequate under *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) by at least one court. See *Chicago and North Western Transp. Co. v. United States*, 678 F.2d 665, 671 (7th Cir. 1982).

jurisdiction under Section 10905(f) was invoked by the incorporators and principals of Appellant. The Commission determined, in an unappealed order, that the net liquidation value of the 19.2-mile segment of line was in excess of $1.7 million (Motion to Affirm App. A-32). Where Congress has given the Commission authority to determine value and where the Commission has in fact determined that value, it is imprudent as a matter of policy to require a carrier to re-litigate the question of value in a state court. Appellant's attempt to invoke state condemnation proceedings in an effort to obtain an independent valuation of the line is squarely an impermissible collateral attack on the Commission's determination of value.[7] See *Village of Mantorville v. Chicago Great Western Ry. Co.*, 8 F. Supp. 791 (D. Minn. 1934).

CONCLUSION

Minnesota state law, which would purport to authorize Appellant to condemn Appellee's abandoned railroad line for continued rail purposes, "stands as an obstacle to the

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[7]The Solicitor General "take[s] no position on the propriety of the state injunction in light of . . . the specific orders of the Commission in this case (see Mot. to Aff. 17 n. 16)." (Solicitor General's Brief at 14, n. 13). Appellee's Motion to Affirm (at 17, n. 16) asserted the argument raised in the courts below that Appellant's resort to Minnesota condemnation law in an effort to prevent Appellee's removal of the subject track also constitutes an impermissible collateral attack on the Commission's decision and order expressly permitting Appellee to remove the subject track and ties. See Chicago and North Western Transp. Co. — Abandonment Between Oelwein, Ia. and Randolph, Mn., I.C.C. Docket No. AB-1 (Sub-No. 113F) (Certificate and Decision decided October 7, 1981, served October 9, 1981). The Commission's decision and order to specifically "permit the removal of rail and ties" was explicitly made a part of the Commission's order in connection with the abandonment proceedings. *Id.*

accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 102 S.Ct. 3014, 3022 (1982), and is thus preempted by 49 U.S.C. §10905.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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September 16, 1983.

U.S. Department of Justice
Office of the Solicitor General
Washington, D.C. 20530

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February 9, 1984

BY FEDERAL EXPRESS

Anne E. Keating, Esquire
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Re: Hayfield Northern Railroad Company, Inc.
and Minnesota v. Chicago and North Western
Transportation Company, No. 82-1579

Dear Ms. Keating:

We believe it is appropriate and necessary for us to respond, on behalf of the United States as amicus curiae in this case, to the contentions concerning the Interstate Commerce Commission that you raised in your letter of February 3.

In our brief on behalf of the United States, we argued (at 26) that "the Interstate Commerce Commission has concluded that its abandonment authority does not extend past the point of abandonment and therefore has recognized that Section 10905 does not preempt a state's post-abandonment authority to condemn a rail line." In support of that proposition we cited (at 27-28) a number of public decisions by the Commission as well as an internal memorandum specifically prepared in connection with the instant case. We continue to believe that this is a fair and accurate argument and that it is not in any way discredited by the materials cited in your letter. A full recitation of the Commission's actions in this case confirms our view.

On April 5. 1982 appellee Chicago and North Western Transportation Company (CNW) asked the Interstate Commerce Commission to intervene in the district court in support of CNW's position that the Interstate Commerce Act preempts state condemnation of an abandoned rail line. On April 27, the General Counsel of the Commission submitted a memorandum to the Commission (J.S. App. A42-A50) recommending against the requested intervention on the following grounds (J.S. App. A42):

> First, we do not believe that CNW's position -- that federal law (49 U.S.C. 10905) preempts condemnation of the branch line under state law after the issuance of a certificate of abandonment -- is correct. Second, we see no substantial interest within the jurisdiction of the Commission which would warrant our intrusion into this sensitive area of federal-state relations.

The General Counsel later reiterated his conclusion that "the shippers have the best of the argument, and that once a rail line has been abandoned, Section 10905 can no longer be viewed as preempting a state law condemnation" (J.S. App. A45). Finally, while recommending against intervention, the General Counsel stated (J.S. App. A49):

> If, however, the Commission wishes to participate, we recommend that it authorize us to take the position that a Commission decision under Section 10905 establishing a subsidy or purchase price for purposes of that section does not preempt a subsequent condemnation proceeding under state law.

On May 4, the Commission (which at that time was composed of five members) "voted * * * to approve [the General Counsel's] recommendation * * * not to participate at the Chicago and North Western Transportation Co.'s request" (Att. A, infra). "In addition, the Commission agreed with Commissioner Gresham as to the position the Commission should take should the district court request Commission views" (ibid.); as expressed in Commissioner Gresham's memorandum (ibid.), that position was that "[a]fter consummation of an abandonment, an ICC decision under Section 10905 does not preempt a subsequent condemnation proceeding under state law." Thus, the Commission approved the very position later taken by the United States in its amicus brief. This action by the Commission was conveyed to counsel for CNW with an explicit

statement that "[t]he Commission believes that after the consummation of an abandonment * * * a Commission decision pursuant to 49 U.S.C. 10905 does not preempt a subsequent condemnation action under state law" (Att. B, infra).

Following the court of appeals' decision, the General Counsel recommended that the Commission not intervene in support of the petition for rehearing filed by appellants Hayfield Northern Railroad Company and the State of Minnesota (J.S. App. A50-A54). Although noting that "[w]e continue to believe that a reasonable case can be made that the existence of Section 10905 does not preempt all such state law actions" (J.S. App. A53; see also J.S. App. A54-A57), the General Counsel recommended against intervention because "we remained neutral to this point and do not believe that intervention is wise unless there are compelling reasons why the Eighth Circuit's decision will cause problems for the Commission" (J.S. App. A53). On December 27, the Commission (now comprising six members) voted not to intervene in the court of appeals (Att. C, infra).

After the court of appeals denied rehearing, appellants requested this Office, on behalf of the United States, to support their petition for a writ of certiorari (Att. D, infra). We contacted the General Counsel of the Commission and asked "to have the Commission's views" (ibid.). In response, the General Counsel prepared a draft letter in which he stated that "[o]nce abandonment has taken place pursuant to Commission authority * * * the Commission's interest in the rail line has ceased because the line has been found to be not required in interstate commerce. * * * * * [W]e generally support the contention of counsel for [Hayfield Northern] that the court of appeals finding of preemption was not mandated" (ibid.). This letter in substantially the same form was sent to our Office as the views of the General Counsel (J.S. App. A58-A63). Thereafter, the Commission approved the letter both in the draft form originally circulated (Att. E, infra) and in the final form transmitted to us by the General Counsel (J.S. App. A64); the Commission acted by a three-member majority, with two Commissioners dissenting (Att. E, infra).

On May 16, 1983, the Supreme Court invited this Office to express the views of the United States at the jurisdictional stage in this case. At our request, the General Counsel of the Commission prepared a draft brief; in accordance with the

position previously endorsed by the Commission, the draft argued "that Section 10905 does not preempt condemnation of abandoned rail property for railroad purposes because the Commission's jurisdiction ends when a carrier exercises a Commission-issued certificate of abandonment" (Att. F, infra). The General Counsel submitted the draft brief to the Commission to determine "whether the draft should contain the names of members of my office and as a result be taken to represent the Commission's views" (ibid.) By this time, however, the composition of the Commission had changed due to the resignation of one member (Commissioner Simmons) who had previously joined the majority in approving the Commission's position that Section 10905 does not preempt a state's post-abandonment condemnation. Because the remaining four Commissioners adhered to their earlier views, the Commission divided 2-2 and thus "failed to reach a majority on the request of the General Counsel [with regard to the draft brief]" (Att. G, infra). In light of this deadlock by the Commission, we submitted to the Supreme Court an amicus brief on behalf of the United States that did not list among the attorneys for the government the General Counsel of the Commission. The same practice was followed in our brief on the merits for the United States as amicus curiae; since the Commission's membership was unaltered, the General Counsel did not seek its views with respect to our merits brief.

As the foregoing discussion indicates, the Commission in this case considered and affirmatively endorsed on two separate occasions the position that was ultimately expressed in our brief for the United States. In addition, as our brief demonstrates, that position is consistent with and supported by a number of public decisions of the Commission in other cases. The 2-2 tie vote of the current Commissioners that you have noted certainly does not constitute a determination by the Commission to reject the views stated on behalf of the United States, and it in no way repudiates or overrules the official actions of the Commission, either in this case or in any other, that support our argument.

Very truly yours,

Rex E. Lee
Solicitor General

Enclosures

cc (w/enclosures): Hon. Alexander L. Stevas
Robert S. Abdalian, Esquire
(by Federal Express)
Gilbert S. Buffington, Esquire
Charles D. Hoornstra, Esquire
Dennis J. Downing, Esquire

ATTACHMENT A

OFFICE OF THE SECRETARY
Clearance Unit

No. 82-166

Re: Request for Commission Intervention in District Court Case Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co.--Abandonment Between Oelwein, Iowa and Randolph, Minnesota

May 5, 1982

MEMORANDUM TO GENERAL COUNSEL BROADLEY:

The Commission voted, by notation, on May 4, 1982, to approve your recommendation circulated April 29, 1982, not to participate at the Chicago and North Western Transportation Co.'s request. In addition, the Commission agreed with Commissioner Gresham as to the position the Commission should take should the district court request Commission views and to have you monitor the progress of this case and advise the Commission of any significant developments.

A copy of each vote is attached.

Kathy Link

cc: All Commissioners
Director Hardy
Director Hatton
Director Dahlgren
Secretary Mergenovich
Acting Deputy Director Gitomer

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INTERSTATE COMMERCE COMMISSION
OFFICE OF THE GENERAL COUNSEL

OFFICE OF CHAIRMAN TAYLOR

G. C. NO. 82-166

RE: REQUEST FOR COMMISSION INTERVENTION IN DISTRICT COURT CASE RELATED TO DOCKET NO. AB-1 (SUB-NO. 113)F, CHICAGO & NORTH WESTERN TRANSPORTATION CO. - ABANDONMENT BETWEEN OELWEIN, IOWA AND RANDOLPH, MINNESOTA

April 29, 1982

MEMORANDUM TO THE COMMISSION:

Attached is a recommendation from the General Counsel that the Commission not intervene in this proceeding.

I agree with his recommendation and so vote.

May I have your votes by C.O.B. Tuesday, May 4, 1982.

Reese H. Taylor, Jr.

cc: Clearance Unit
General Counsel Broadley

APR 29 4 35 PM '82
OFFICE OF THE SECRETARY RECEIVED

OFFICE OF VICE CHAIRMAN GILLIAM

G. C. No. 82-166

Re: Request for Commission Intervention in District Court Case Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co. - Abandonment Between Oelwein, Iowa and Randolph, Minnesota

May 4, 1982

MEMORANDUM TO CHAIRMAN TAYLOR:

I vote to approve the General Counsel's recommendation.

L.C.G.

GILLIAM

cc: All Commissioners
Office of the General Counsel
Section of Finance
Clearance Unit

MAY 5 7 21 AM '82
OFFICE OF THE SECRETARY RECEIVED

OFFICE OF COMMISSIONER GRESHAM

G. C. No. 82-166

Re: Request for Commission Intervention in District Court Case Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co. - Abandonment Between Oelwein, Iowa and Randolph, Minnesota

OFFICE OF THE SECRETARY RECEIVED MAY 4 4 17 PM '82

MAY 4 1982

MEMORANDUM TO CHAIRMAN TAYLOR:

I vote to approve the General Counsel's recommendation not to participate at CNW's request. If the district court should later request our views, however, the Commission should participate. I vote to adopt the following position:

(1) Prior to the consummation of an abandonment, a state condemnation action will not lie because the ICC's authority is exclusive. Compare footnote 2 of the General Counsel's memorandum and Kalo Brick, 450 US. 311, 323 (1981).

(2) After consummation of an abandonment, an ICC decision under Section 10905 does not preempt a subsequent condemnation proceeding under state law.

(3) If so requested by the trial court, the Commission should be prepared to explain how it determined the constitutional minimum value of the line.

I request the General Counsel's office to monitor the progress of this case, and to advise the Commission of any significant developments.

GRESHAM

cc: All Commissioners
General Counsel Broadley
Director Hardy
Acting Deputy Director Gitomer
Clearance Unit

OFFICE OF THE
SECRETARY
RECEIVED
CLEARANCE UNIT

OFFICE OF COMMISSIONER ANDRE MAY 4 5 00 PM '82

G.C. NO. 82-166

RE: REQUEST FOR COMMISSION INTERVENTION IN DISTRICT COURT CASE RELATED TO DOCKET NO. AB-1 (SUB-NO. 113)F, CHICAGO & NORTH WESTERN TRANSPORTATION CO. - ABANDONMENT BETWEEN OELWEIN, IOWA AND RANDOLH, MINNESOTA

May 4, 1982

MEMORANDUM TO CHAIRMAN TAYLOR:

I agree with the General Counsel's recommendation not to intervene.

Frederic N. Andre

cc: All Commissioners
General Counsel Broadley
Clearance Unit

OFFICE OF COMMISSIONER STERRETT

G. C. NO. 82-166

Re: Request for Commission Intervention in District Court Case Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co. - Abandonment Between Oelwein, Iowa and Randolph, Minnesota

May 4, 1982

MEMORANDUM TO CHAIRMAN TAYLOR:

I agree with the General Counsel's recommendation. The CNW should be notified that the Commission does not intend to intervene.

Malcolm M. B. Sterrett

cc: All Commissioners
General Counsel Broadley
Director Hardy
Acting Deputy Director Gitomer
Clearance Unit

MAY 5 7 21 AM '82
OFFICE OF THE SECRETARY
RECEIVED
CLEARANCE UNIT

ATTACHMENT B

Interstate Commerce Commission
Washington, D.C. 20423

B

OFFICE OF THE GENERAL COUNSEL

May 11, 1982

Mr. Stuart F. Gassner
Assistant General Counsel
Chicago and North Western
Transportation Company
One North Western Center
Chicago, Illinois 60606

Dear Mr. Gassner:

This letter confirms our telephone conversation on May 5, 1982, with Anne Keating of your office. The Commission voted not to participate in Hayfield Northern Railroad Company v. Chicago and North Western Transportation Company, Civil No. 3-82-376 (D. Minn.).

Should the court request the Commission's views, it will state its position that, prior to the consummation of an abandonment, a condemnation action under state law will not lie because the Commission's authority is exclusive. See Chicago & North Western Transportation Co. v. Kalo Brick & Tile, 450 U.S. 311 (1981). The Commission believes that after the consummation of an abandonment, however, a Commission decision pursuant to 49 U.S.C. 10905 does not preempt a subsequent condemnation action under state law.

The Commission has asked me to monitor the progress of the district court case. I understand that the hearing on CNW's motion to dismiss will be held on May 14, 1982. Would you please inform Cecelia Higgins at (202) 275-7867 of the court's disposition of the motion and of any other significant action taken in the case.

Sincerely yours,

John Broadley

John Broadley
General Counsel

cc: Chairman Taylor

Chairman Control No. 8200957
JB/CEHiggins:pam

G.C. Memo No. 82-166

ATTACHMENT C

OFFICE OF COMMISSIONER STERRETT

G.C. No. 82-524

Re: Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880

(Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co. - Abandonment Between Oelwein, Iowa and Randolph, Minnesota)

December 27, 1982

MEMORANDUM TO CHAIRMAN TAYLOR:

I vote not to intervene in the Eighth Circuit proceeding.

Malcolm M. B. Sterrett

cc: All Commissioners
General Counsel Broadley
Clearance Unit

RECEIVED
DEC 27 3 49 PM '82
INTERSTATE COMMERCE COMMISSION
OFFICE OF THE GENERAL COUNSEL

OFFICE OF COMMISSIONER GRADISON

G.C. NO. 82-524

RE: HAYFIELD NORTHERN RAILROAD CO., INC. V. CHICAGO AND NORTH WESTERN TRANSPORTATION CO., U.S.C.A., 8th CIR., NO. 82-1880

(RELATED TO DOCKET NO. AB-1 (SUB-NO. 113)F, CHICAGO & NORTH WESTERN TRANSPORTATION CO.--ABANDONMENT BETWEEN OELWEIN, IOWA AND RANDOLPH, MINNESOTA)

December 27, 1982

MEMORANDUM TO CHAIRMAN TAYLOR:

I vote not to intervene.

Heather J. Gradison

cc: All Commissioners
Clearance Unit
General Counsel Broadley
Director Hardy
Deputy Director Gitomer

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Dec 27 3 41 PM '82
INTERSTATE COMMERCE COMMISSION
OFFICE OF THE GENERAL COUNSEL

OFFICE OF CHAIRMAN TAYLOR

G. C. NO. 82-524

RE: Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880

(Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co. - Abandonment Between Oelwein, Iowa and Randolph, Minnesota)

December 27, 1982

MEMORANDUM TO THE COMMISSION:

I agree with the General Counsel's recommendation not to intervene in this proceeding and so vote.

Reese H. Taylor, Jr.

cc: Clearance Unit
General Counsel Broadley
Director Hardy
Deputy Director Gitomer

RECEIVED
Dec 28 8 19 AM '82
INTERSTATE COMMERCE COMMISSION
OFFICE OF THE GENERAL COUNSEL

OFFICE OF COMMISSIONER SIMMONS

December 27, 1982

G.C. No. 82-524

Re: Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880

(Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co. - Abandonment Between Oelwein, Iowa and Randolph Minnesota)

MEMORANDUM TO CHAIRMAN TAYLOR:

I vote not to intervene in this proceeding.

J. J. Simmons, III

cc: All Commissioners
Director Hardy
General Counsel Broadley
Clearance Unit

RECEIVED
DEC 28 9 17 AM '82
INTERSTATE COMMERCE COMMISSION
OFFICE OF THE GENERAL COUNSEL

OFFICE OF COMMISSIONER ANDRE

December 27, 1982

G.C. No. 82-524

Re: Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880

(Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co. - Abandonment Between Oelwein, Iowa and Randolph, Minnesota)
Prior G.C. Memoranda Nos. 82-166 and 82-323

MEMORANDUM TO CHAIRMAN TAYLOR:

Please show Commissioner Andre as absent and not participating in the disposition of this proceeding.

Mavis Wiggert

cc: Commissioners
General Counsel Broadley
Clearance Unit

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DEC 27 2 33 PM '82
INTERSTATE COMMERCE COMMISSION
OFFICE OF THE GENERAL COUNSEL

OFFICE OF VICE CHAIRMAN GILLIAM

G.C. No. 82-524

Re: Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880

(Related to Docket No. AB-1 (Sub-No. 113)F Chicago & North Western Transportation Co. - Abandonment Between Oelwein, Iowa and Randolph, Minnesota
Prior G.C. Memorandua Nos. 82-166 and 82-323

December 27, 1982

MEMORANDUM TO CHAIRMAN TAYLOR:

Please show Vice Chairman Gilliam as absent and not participating in the disposition of this proceeding.

Clyde J. Hart, Jr.

cc: All Commissioners
General Counsel Broadley
Clearance Unit

RECEIVED
JAN 3 10 14 AM '83
INTERSTATE COMMERCE COMMISSION
OFFICE OF THE GENERAL COUNSEL

ATTACHMENT D

CEH D

HFR/CEH:jst

OFFICE OF THE GENERAL COUNSEL

February 16, 1983

No. 83-88

MEMORANDUM TO CHAIRMAN TAYLOR:

Re: Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880

(Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co.--Abandonment Between Oelwein, Iowa and Randolph, Minnesota)

Prior G.C. Memorandum Nos. 82-166, 82-323, and 82-524

In prior G.C. memorandum No. 82-524, we informed the Commission of the decision in which the United States Court of Appeals for the Eighth Circuit held that 49 U.S.C. 10905--the provision of the Act for offers of assistance to avoid abandonment--preempts a court action under state law to condemn for continued railroad use a rail line that was abandoned pursuant to a Commission decision. In that memorandum, we recommended that the Commission not intervene in support of the petition of Hayfield Northern Railroad Company ("HN") and the State of Minnesota for rehearing and the Commission agreed.

The Eighth Circuit denied rehearing and HN has asked the Solicitor General to support its petition to the Supreme Court for a writ of certiorari. The Solicitor General has asked for the Commission's views (see attachment A).

We outline below the views that we propose to present by letter to the Solicitor General. The Solicitor General would like us to submit our views immediately. We ask the Commission to inform us by February 18 if it disagrees with our analysis, and if so, to notify us of the views it wishes us to present, if any.

Background

In the interest of brevity, we refer you to the background section in prior memorandum No. 82-524. HN is a corporation composed of shippers that wish to condemn for continued railroad purposes, under a Minnesota statute, a 19-mile line of the Chicago & North Western Transportation Co. ("CNW").

The Court of Appeals Decision[1]/

The court held that the existence of Section 10905 preempts a state law authorizing condemnation of an abandoned rail line for continued railroad purposes; it did not find preemption based on the fact that the shippers that formed HN had invoked Section 10905 by offering to subsidize the line.[2]/

The court found (slip op. 7) that the procedural detail of Section 10905 indicates that Congress "granted the Commission exclusive and plenary authority to provide for continuation of rail service in connection with abandonments." The court reasoned that state law condemnation proceedings would interfere with the explicit time limits in Section 10905 for disposing of offers to purchase or subsidize lines about to be abandoned. The court also noted that a state law condemnation action would circumvent the Commission's determination of the value of the line for purposes of Section 10905. The Court rejected HN's argument that the Commission has recognized in prior decisions that abandoned lines may be condemned under state law.

1/ The decision is attached to prior memorandum No. 82-524. The court of appeals affirmed the district court decision circulated in prior memorandum No. 82-323.

2/ Under Section 10905, a financially responsible person may offer to subsidize or purchase a line that the Commission has authorized the railroad to abandon. If the offeror and the railroad cannot agree on terms, either may request the Commission to establish them. 49 U.S.C. 10905(e). The agency's terms are binding except that the offeror may withdraw its offer within ten days. 49 U.S.C. 10905(f)(2).

The Commission consciously did not participate before the district court or the court of appeals in this case because neither the state law condemnation action nor preclusion of such an action affects the Commission's exercise of its power to regulate the abandonment of service.3/ The court of appeals correctly noted that that power is plenary and exclusive, citing Chicago and North Western Trans. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981). Once abandonment has taken place pursuant to Commission authority, however, the Commission's interest in the rail line has ceased because the line has been found to be not required in interstate commerce.

The fact that the court of appeals decision does not affect the Commission's interests does not mean that other federal government agencies have no interest in the decision. The Department of Transportation may well have an interest because it provides subsidies and other assistance to enable state governments and their political subdivisions to continue rail service on lines that are about to be or have been abandoned. The court of appeals in this case has foreclosed one important means by which states may help to continue rail service without relying on federal subsidies--by allowing condemnation of abandoned rail lines for continued railroad use.

3/ Defendant Chicago & North Western Transportation Company asked the Commission to intervene before the district court in support of its position that Section 10905 preempts a state law condemnation for continued railroad purposes. Appellants HN and the State of Minnesota asked the Commission to intervene before the court of appeals in opposition to that position. The Commission declined both requests.

We believe that the court of appeals' holding presents a significant Tenth Amendment issue because it interferes with the State's choice of purposes for which it authorizes use of an integral governmental function--the power of eminent domain. The condemnation of rail lines for continued rail purposes under a state law is not to be confused with a state's running a railroad, which the Supreme Court has held is not an integral governmental function protected from regulation by the Tenth Amendment. United Transportation Union v. Long Island R. Co., 102 S. Ct. 1349 (1982).

We also believe that the conclusion of the court of appeals that Section 10905 precludes state law condemnation actions for continued rail purposes is not necessarily warranted. Under long-established precedent, the Supreme Court declines to find preemption of a state statute unless there is a clear conflict with a federal statute, Kesler v. Department of Public Safety, 369 U.S. 153, 172 (1962), and will attempt to reconcile the operation of both statutory schemes with one another, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973).

The court of appeals found preemption because the Minnesota state law at issue "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting Section 10905 (slip op. 5). The court largely was concerned that a state law condemnation action was a "protracted legal proceeding" that would undermine the strict time limit imposed in Section 10905 for purchases or subsidy agreements on lines about to be abandoned (id. at 7).

The "delay" inherent in a state law condemnation action does not necessarily harm a railroad because most condemnation statutes provide that the court may order the condemnor to post a bond during the pendency of the action. Therefore, even if a party such as HN has invoked the purchase or subsidy provisions of Section 10905 and then declined to fulfill the terms set by the Commission, at most the railroad will have "lost" 110 days--the statutory time during which any arrangement under Section 10905 for continued rail service is to be completed (see slip op. 6). In a subsequent state law action, a condemnor such as HN will post a bond to compensate the railroad for any damages that the condemnation action should cause.4/ And if a party never invokes Section 10905, but rather only seeks to condemn a rail line for continued rail use, then the railroad never suffers any uncompensated delay.

Although we support generally the contention of counsel for HN that the court of appeals finding of preemption was not mandated, we do not agree with all of his analysis. In his letter to the Solicitor General (attachment B), counsel for HN states that the decision of the Eighth Circuit finding preemption conflicts with Chicago & North Western Transportation Co. v. United States, 678 F.2d 665, 667 (7th Cir. 1982), in which the Seventh Circuit stated that a potential offeror under former Section 10905 "could . . . wait till the line was abandoned and then reacquire it [by eminent domain] at its nonrail value--or even condemn it before abandonment. . . ." We do not agree that there is a conflict. We agree with the court of appeals (slip

---

4/ We understand from HN that such a bond was required by the federal district court in this case.

op. 11) that the Seventh Circuit's language was dictum and does not show that the Seventh Circuit believes the opposite of the Eighth Circuit, i.e., that state condemnation laws are consistent with the purpose of Section 10905. Moreover, the Seventh Circuit did not discuss the issue of federal preemption.

Similarly, there is no direct conflict between this decision and Patrick W. Simmons v. ICC, No. 81-2009 (D.C. Cir. December 14, 1982) (circulated in G.C. Memorandum No. 82-518). In Simmons, the D.C. Circuit cited with approval (slip op. 10) the Commission's statement that it lacks jurisdiction to regulate a state's acquisition of an already abandoned rail line. That statement does not indicate any view of whether the Commission's plenary jurisdiction over abandonments extends also to "provid[ing] for continuation of rail service in connection with abandonment," as the court of appeals found in this case (slip op. 7).

We do find a conflict in the philosophies of the Simmons decision and the court of appeals decision in this case, however, because the Simmons court recognized the willingness of state governments to "to undertake programs to retain local rail service and that funding for such programs typically is "short term" (slip op. at 22). In this case, the court of appeals failed to consider an important state function when it found that a federal statute preempted one of the means by which a state can help to retain local rail service after short-term funding is exhausted.

We also find a conflict between the court of appeals decision and the interest of the federal government (largely that of DOT) in encouraging states and their subdivisions to continue rail service that is not required in interstate commerce. In 1973, Congress

enacted a federal entitlement program that allowed states and their subdivisions to continue rail service and provided loans for state acquisition and modernization of rail properties. Sections 401-403, Regional Railroad Reorganization Act of 1973, Pub. L. 93-236, 87 Stat. 985, 1010-1012. In 1976, Congress repealed those provisions and replaced them with a comprehensive local rail service assistance program including both entitlement funds and financial assistance. Sections 803, 805, 806, Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31, 130-133, 139-143. See also, Chicago & North Western, supra, 678 F.2d 665. As the funds for such entitlement programs diminish in an era of fiscal restraint, the states will depend more on condemnation as a means to continue rail service.

Sufficient copies are attached to permit distribution to the entire Commission.

John Broadley

JOHN BROADLEY
General Counsel

Attachments

cc: Director Hardy
Deputy Attorney W. Michel
Clearance Unit

Attachment A

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

January 25, 1983

John Broadley, Esq.
General Counsel
Interstate Commerce Commission
Room 5211
12th and Constitution, N.W.
Washington, D.C. 20423

Re: Hayfield Northern Railroad v. Chicago North Western Transportation Company
No. 82-1880

Dear Mr. Broadley:

I enclose the papers in Hayfield Northern Railroad v. Chicago North Western. The Solicitor General has been asked to take a position in the case; and would like to have the Commission's views.

Sincerely yours,

Paul M. Bator
Deputy Solicitor General

Enclosures

RECEIVED
JAN 26 2 25 PM '83
INTERSTATE COMMERCE COMMISSION
OFFICE OF THE GENERAL COUNSEL

WARD, GRAY & OEHLER, LTD.
ATTORNEYS AT LAW

ROBERT T. WARD
F. JAMES GRAY
WILLIAM OEHLER
ROBERT S. ABDALLAH

103 OMNI BUILDING
1652 GREENVIEW DRIVE S. W.
P. O. BOX 6390
ROCHESTER, MINNESOTA 55903
507-288-5567

BRANCH OFFICE:
HAYFIELD, MINN.
507-477-3424

KASSON, MINN.
507-634-7491

January 24, 1983

OFFICE OF
RECEIVED
JAN 25 1983
SOLICITOR GENERAL

The Honorable Rex Lee
Solicitor General of the
United States
Department of Justice
Pennsylvania & 9th Street
Washington, D.C. 20530

RE: Hayfield Northern Railroad v. Chicago North Western Transportation Company
No. 82-1880 (8th Cir. December 3, 1982)

Sir:

The Hayfield Northern requests that the United States take a position in the above captioned case. In this case the Eighth Circuit decided that the Staggers Act, 49 U.S.C. §10905, preempts Minnesota condemnation law even when a railroad has abandoned a rail line in Minnesota with ICC approval, even after the ICC has relinquished all jurisdiction and interest in the rail line, and even when a statutorily authorized rail company has properly invoked Minnesota condemnation law in order to recommence rail service to citizens in Minnesota.

The Eighth Circuit decision has broad implication to the ordering of federal and state relationships. The States of Minnesota, Iowa, and Wisconsin will join in pleading for Supreme Court review. It is against that backdrop that this request to the United States is made. The Eighth Circuit decision is an unwarranted assault on state sovereignty, reducing the sovereign prerogative of eminent domain to insignificance, while extending the commerce clause beyond the nth degree. Further, the Eighth Circuit decision conflicts with the Supreme Court's instruction to reconcile state and federal schemes if possible before finding preemption. Importantly, the decision of the Eighth Circuit cannot be harmonized with a recent Seventh Circuit case, Chicago & North Western Transportation Company v. U.S., 678 F.2d 665, where the Seventh Circuit stated that a state condemnation would lie after a railroad line had been abandoned. In addition, the D.C. Circuit in Simmons v. ICC, No. 81-2009 (D.C. Cir. Dec. 14,

1982), quoted approvingly the Commission's pronouncement, "that it lacked jurisdiction to regulate state acquisition of an abandoned rail line, since by the process of abandonment the line lost its status as rail property." Slip op. at 10.

I have enclosed copies of the following:

1. Eighth Circuit Decision
2. Hayfield Northern's Eighth Circuit Briefs
3. State of Minnesota's Brief
4. State of Wisconsin Brief
5. Simmons v. ICC
6. 8th Circuit Appendix
7. Comments of AAR
8. Correspondence between Senator Boschwitz and ICC
9. CNW v. U.S.A. (Slip opinion)

Please contact me, if you deem it appropriate at (507)288-5567.

Yours very truly,

WARD, GRAY & OEHLER, LTD.

/Robert S. Abdalian

Robert S. Abdalian

RSA/rca

Enclosures

ATTACHMENT F

OFFICE OF THE SECRETARY
Clearance Unit

No. 83-88

Re: Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880

(Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co.--Abandonment Between Oelwein, Iowa and Randolph, Minnesota)

Prior G.C. Memorandum Nos. 82-166, 82-323, and 82-624

February 22, 1983

MEMORANDUM TO GENERAL COUNSEL BROADLEY:

A majority of the Commission voted, by notation, on February 18, 1983, to approve your recommended analysis circulated February 16, 1983, to be presented to the Solicitor General by letter.

Vice Chairman Sterrett and Commissioner Gradison disagreed with the proposed analysis for the reasons stated in their votes.

A copy of each vote is attached.

Kathy Link

cc: All Commissioners
Director Hardy
Director Hatton
Director Dahlgren
Deputy Director Gitomer
Secretary Mergenovich

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FEB 22 2 09 PM '83
INTERSTATE COMMERCE
COMMISSION
OFFICE OF THE
GENERAL COUNSEL

OFFICE OF CHAIRMAN TAYLOR

G. C. NO. 83-88

Re: Hayfiled Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880

(Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co.--Abandonment Between Oelwein, Iowa and Randolph, Missesota)

February 17, 1983

MEMORANDUM TO THE COMMISSION:

I vote to approve the proposal of the General Counsel.

Reese H. Taylor, Jr.

cc: Clearance Unit
General Counsel Broadley
Director Hardy

OFFICE OF VICE CHAIRMAN STERRETT

G.C. NO. 83-88

Re: Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880

(Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co.--Abandonment Between Oslwein, Iowa and Randolph, Minnesota)

Prior G.C. Memorandum Nos. 82-166, 82-323, and 82-524

February 18, 1983

MEMORANDUM TO CHAIRMAN TAYLOR:

I disagree with the General Counsel's proposed advice to the Solicitor General, as outlined in G.C. Memorandum No. 83-88. In my view the 8th Circuit Court of Appeals was entirely correct in its decision that Section 10905 preempts the abandonment area. In fact, it is simply inaccurate to suggest that this interpretation prohibits a state from acquiring an abandoned line. On the contrary, as the court pointed out, the state has already had its opportunity to acquire the line and walked away from it.

It is also misleading to suggest that the Commission has no interest in a rail line once it has authorized abandonment. In fact, the Commission has an interest to

ensure that its abandonment order is not frustrated by a party that has already had its day in court.

Finally, it should be noted that the underlying policy of Federal preemption in this area has a very sound basis. In the face of widespread railroad failures Congress has acted in the last ten years to eliminate or minimize regulatory roadblocks which prevented rail carriers from expeditiously shedding unprofitable lines. This Commission should not step back into the past to aid the states in erecting fifty different impediments to the progress made thus far.

Malcolm M. B. Sterrett

cc: All Commissioners
General Counsel Broadley
Director Hardy
Deputy Director Gitomer
Clearance Unit

OFFICE OF COMMISSIONER ANDRE

February 18, 1983

G.C. No. 83-88

Re: Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880

(Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co.--Abandonment Between Oelwein, Iowa and Randolph, Minnesota)

Prior G.C. Memorandum Nos. 82-166, 82-323, and 82-524

MEMORANDUM TO CHAIRMAN TAYLOR:

I concur with the recommendation of the General Counsel.

Frederic N. Andre

cc: Commissioners
General Counsel Broadley
Clearance Unit

OFFICE OF COMMISSIONER SIMMONS

February 18, 1983

G.C. No. 83-88

Re: Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., U.S.C.A., 8th Cir., No. 82-1880

(Related to Docket No. AB-1 (Sub-No. 113)F, Chicago & North Western Transportation Co. -- Abandonment Between Oelwein, Iowa and Randolph, Minnesota

---

MEMORANDUM TO CHAIRMAN TAYLOR:

I vote to approve the General Counsel's proposal.

J. J. Simmons, III

cc: All Commissioners
Director Hardy
General Counsel Broadley
Clearance Unit

FEB 18 4 10 PM '83
OFFICE OF THE SECRETARY

OFFICE OF COMMISSIONER GRADISON

G.C. NO. 83-88

RE: HAYFIELD NORTHERN RAILROAD CO., INC. V. CHICAGO AND NORTH WESTERN TRANSPORTATION CO., U.S.C.A., 8th CIR., NO. 82-1880

(RELATED TO DOCKET NO. AB-1 (SUB-NO. 113)F CHICAGO & NORTH WESTERN TRANSPORTATION CO.--ABANDONMENT BETWEEN OELWEIN, IOWA AND RANDOLPH, MINNESOTA)

February 18, 1983

MEMORANDUM TO CHAIRMAN TAYLOR:

I disagree with the views expressed by the General Counsel in his memorandum of February 16, 1983.

We should not base the bulk of our opposition to the 8th Circuit opinion on assumptions about the possible views of DOT.

Second, I am not convinced and we should not represent that there is no cost to a railroad where its property is subject to a specialized condemnation proceeding such as the one involved here.

Third, the discussion of legal conflicts is acceptable as far as it goes, and could be conveyed to the Solicitor, but I do not agree with the discussion of a conflict of philosophies on page 6.

Finally, one day is hardly an adequate time to consider fully the philpsophical questions the General Couhnsel proposes

to discuss. Thus, any response to the Solicitor should focus on legal analysis of case law and not a philosophical discussion.

Heather L. Gradison

Heather J. Gradison

cc: All Commissioners
Clearance Unit
General Counsel Broadley

ATTACHMENT F

Note Attorneys: Copy of brief and attachments are not being distributed to you. If you would like to see attachments, there will be a copy in this office.

F

Joan

HFR/CEH:erb

OFFICE OF THE GENERAL COUNSEL

No. 83-280 July 5, 1983

MEMORANDUM TO CHAIRMAN TAYLOR:

Re: Hayfield Northern Railroad Company, Inc., and State of Minnesota v. Chicago and North Western Transportation Company, No. 82-1579, U.S. Sup. Ct.

Prior G.C. Memoranda Nos. 82-166, 82-323, 82-524, and 83-88

Attached is a Brief for the United States as Amicus Curiae in Support of Appellants that we have drafted for the Solicitor General for filing in this case (Attachment A). This memorandum is to seek authorization for this office to join in the brief as counsel for the Commission, which means that the views we present will be considered to be those of the Commission.

In this case, Hayfield Northern Railroad Company and the State of Minnesota have appealed to the Supreme Court the decision of the United States Court of Appeals for the Eighth Circuit in Hayfield Northern Railroad Co., Inc. v. Chicago & N. W. Trans. Co., No. 82-1880 (8th Cir. Dec. 3, 1982). The court of appeals held that 49 U.S.C. 10905 preempts a state law authorizing condemnation of an abandoned rail line for railroad purposes.

Hayfield Northern and the State sought in the Supreme Court a stay of the court of appeals' mandate. The Solicitor General asked our view of the merits of the case, in which the Commission did not participate in the courts below (see

memoranda Nos. 82-166, 82-323, and 82-524). In memorandum No. 83-88, we presented our view of the merits and asked the Commission to endorse it. The Commission did so; and accordingly we sent the attached letter to the Solicitor General (Attachment B).

Hayfield Northern and the State of Minnesota have filed a Jurisdictional Statement in the Supreme Court urging the Court to reverse the court of appeals. The States of Wisconsin and Iowa have filed briefs in support. Chicago and North Western filed a motion to affirm the court of appeals.

The Supreme Court directed the Solicitor General to file a brief for the United States as amicus curiae. In turn, the Solicitor General asked this office to draft the brief (Attachment C).

The attached draft brief presents views that conform to those expressed in our prior letter to the Solicitor General's office (views that the Commission endorsed) and to the Commission's statements about the scope of its jurisdiction over rail abandonments. We believe that the brief accurately presents the Commission's view that Section 10905 does not preempt condemnation of abandoned rail property for railroad purposes because the Commission's jurisdiction ends when a carrier exercises a Commission-issued certificate of abandonment.

We submitted the draft brief to the Solicitor General on July 1. We wish to inform him as soon as possible as to whether the draft should contain the names of members of my office

and as a result be taken to represent the Commission's views. Accordingly, unless the Commission objects, we will inform the Solicitor General that the draft reflects the views of the Commission on July 8, 1983.

Sufficient copies are attached to permit distribution to the entire Commission.

John Broadley

JOHN BROADLEY
General Counsel

Attachments

ATTACHMENT G

G

OFFICE OF THE SECRETARY
Clearance Unit

G.C. No. 83-~~230~~ 280

Re: Hayfield Northern Railroad Company, Inc. and State of Minnesota v. Chicago and North Western Transportation Company, No. 82-1579, U.S. Sup. Ct.

Prior G.C. Memoranda Nos. 82-166, 82-323, 82-524, and 83-88

July 12, 1983

MEMORANDUM TO GENERAL COUNSEL BROADLEY:

On July 11, 1983, the Commission failed to reach a majority on the request of the General Counsel circulated July 5, 1983.

Chairman Taylor would approve the request of the General Counsel.

Commissioner Andre concurred with the General Counsel's recommendation to file the amicus brief.

Vice Chairman Sterrett objects to the content of the proposed brief for the reasons stated in his vote of February 18, 1983, and stated that the opinions in the draft are not the views of this Commission.

Commissioner Gradison does not agree with the opinions set out in the draft brief and stated that the General Counsel should make clear to the Solicitor General that a majority of the Commission does not endorse the position taken in the brief.

A copy of each vote is attached.

cancel 7-11-83

Sheryl Pearson

cc: All Commissioners
Secretary Mergenovich
Acting Director Lewis
Director Hatton
Director Dahlgren
Deputy Director Gitomer

*Related to AB-1 (Sub-No. 113).

Jul 12 2 3R PM '83

OFFICE OF VICE CHAIRMAN STERRETT

G.C. NO. 83-280

Re: Hayfield Northern Railroad Company, Inc. and State of Minnesota v. Chicago and North Western Transportation Company, No. 82-1579, U.S. Sup. Ct.

Prior G.C. Memoranda Nos. 82-166, 82-323, 82-524, and 83-88

July 7, 1983

MEMORANDUM TO CHAIRMAN TAYLOR:

I object to the content of the proposed brief for the reasons stated in my vote of February 18, 1983. The opinions stated in the draft are not the views of this Commission.

Malcolm M. B. Sterrett

cc: All Commissioners-
General Counsel Broadley

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OFFICE OF THE SECRETARY
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OFFICE OF COMMISSIONER GRADISON

G.C. 83-280

RE: HAYFIELD NORTHERN RAILROAD COMPANY, INC. AND STATE OF MINNESOTA V. CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, NO. 82-1579, U.X. SUP. CT.

July 11, 1983

MEMORANDUM TO CHAIRMAN TAYLOR:

I do not agree with the opinions set out in the draft brief. The General Counsel should make clear to the Solicitor General that a majority of the Commission does not endorse the position taken in the brief.

Heather J. Gradison

Heather J. Gradison

cc: All Commissioners
Clearance Unit
General Counsel Broadley

OFFICE OF THE SECRETARY
FCC
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OFFICE OF COMMISSIONER ANDRE

July 8, 1983

G.C. No. 83-280

Re: Hayfield Northern Railroad Company, Inc. and State of Minnesota v. Chicago and North Western Transportation Company, No. 82-524, U.S. Sup. Ct.

MEMORANDUM TO CHAIRMAN TAYLOR:

I concur with the General Counsel's recommendation to file the amicus brief.

Frederic N. Andre

cc: Commissioners
General Counsel Broadley

OFFICE OF THE SECRETARY
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OFFICE OF CHAIRMAN TAYLOR

G. C. NO. 83-280

Re: Hayfield Northern Railroad Company, Inc. and State of Minnesota v. Chicago and North Western Transportation Company, No. 82-1579, U.X. Sup. Ct.

July 8, 1983

MEMORANDUM TO THE COMMISSION:

I vote to approve the request of the General Counsel.

Reese H. Taylor, Jr.

cc: Clearance Unit
General Counsel Broadley

No. 82-1579-AFX
Status: GRANTED

Title: Hayfield Northern Railroad Company, Inc. and Minnesota, Appellants
v.
Chicago and North Western Transportation Company

Docketed:
March 25, 1983

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for appellant: Abdalian, Robert S., Buffington, Gilbert S.

Counsel for appellee: Keating, Anne E.

Entry	Date	Note	Proceedings and Orders
1	Mar 25 1983	G	Statement as to jurisdiction filed.
2	Mar 25 1983		Appendix of appellant Hayfield Northern RR Co. filed.
3	Feb 9 1983		Application for stay filed.
4	Feb 9 1983		Response filed.
5	Feb 10 1983		Reply to response filed.
6	Feb 10 1983		Application for stay denied by Blackmun, J.
7	Feb 11 1983		Application for stay refiled with Rehnquist, J.
8	Feb 15 1983		Solicitor General invited to file a memorandum expressing the views of the United States. (Due 2/18/83)
9	Feb 16 1983		Opposition to respondent to reply received.
10	Feb 18 1983		Supplemental of petitioners received.
11	Feb 18 1983		Memorandum of the United States received.
12	Feb 22 1983		Application for stay denied by Rehnquist, J.
13	Feb 23 1983		Application for stay refiled with O'Connor, J.
14	Mar 7 1983		DENIED by order of the Court.
15	Apr 25 1983		Motion of appellee Chicago & NW Transp. Co. to affirm filed.
17	Apr 25 1983		Brief amicus curiae of State of Wisconsin filed.
18	Apr 27 1983		DISTRIBUTED. May 12, 1983
19	May 2 1983	X	Reply brief of appellant filed.
20	Apr 22 1983	X	Brief amicus curiae of Iowa Dept. of Transportation filed.
21	May 5 1983	X	Brief of appellee Chicago & NW Transp. Co. in response to Amicus Curiae Brief of Iowa Dept. of Transportation filed.
22	May 16 1983	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
24	Jun 2 1983		Supplemental brief of appellants Hayfield Northern RR Co., et al. filed.
25	Aug 1 1983		Brief amicus curiae of United States filed.
26	Aug 3 1983		REDISTRIBUTED. September 26, 1983
27	Sep 17 1983		Response of appellee to brief for the United States as amicus curiae filed.
28	Oct 3 1983		PROBABLE JURISDICTION NOTED.
			**********
29	Nov 17 1983		Brief amicus curiae of United States filed.
30	Nov 17 1983		Brief of appellants Hayfield Northern RR Co., et al. filed.
31	Nov 17 1983		Joint appendix filed.
32	Nov 17 1983		Brief amicus curiae of Arkansas, et al. filed.
33	Dec 1 1983		Record filed.
34	Nov 30 1983	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided

No. 82-1579-AFX

Entry	Date	Note	Proceedings and Orders
			argument filed.
35	Dec 12 1983		Motion of the Solicitor General for leave to participate in oral GRANTED.
36	Dec 17 1983		Brief of appellee Chicago & NW Transp. Co. filed.
37	Jan 9 1984		SET FOR ARGUMENT. Tuesday, February 21, 1984. (1st case)
38	Jan 11 1984		CIRCULATED.
39	Feb 10 1984	X	Reply brief of appellants Hayfield Northern RR Co., et al. filed.
40	Feb 21 1984		ARGUED.